

Capital Reporting Company  
In Re: Determination of Royalty Rates (Public) 04-28-2015

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Before the  
UNITED STATES COPYRIGHT ROYALTIES BOARD  
Library of Congress  
Washington, D.C.

**ORIGINAL**

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In Re: : Docket No.  
: 15-CRB-0001-WR  
Determination of Royalty : (2016-2020)  
Rates and Terms for : Volume 2-PUBLIC  
Ephemeral Recording and : Pages 331-388  
Digital Performance of : Pages 408-436  
Sound Recordings (Web IV) : Pages 574-664  
-----:

PUBLIC SESSION

Washington, D.C.  
Tuesday, April 28, 2015

The hearing in the above-entitled  
matter was convened at 9:00 a.m.

BEFORE COPYRIGHT ROYALTY JUDGES:

SUZANNE M. BARNETT, CHIEF JUDGE  
DAVID R. STRICKLER, JUDGE  
JESSE FEDER, JUDGE

1 A P P E A R A N C E S

2

On behalf of SoundExchange:

3 MUNGER TOLLES & OLSON, LLP

GLENN POMERANTZ, ESQUIRE

4 355 South Grand Avenue, 3rd Floor

Los Angeles, California 90071

5 213-683-9107

6 On behalf of GEO Music:

GEORGE JOHNSON

7 GEORGE JOHNSON MUSIC PUBLISHING

23 Music Square East, Suite 204

8 Nashville, Tennessee 37203

615-242-9999

9

On behalf of Pandora Media, Inc.

10 WEIL GOTSHAL & MANGES, LLP

BRUCE RICH, ESQUIRE

11 767 Fifth Avenue

New York, New York 10153

12 212-310-8000

13 On behalf of National Association of  
Broadcasters:

14 WILEY REIN, LLP

BRUCE G. JOSEPH, ESQUIRE

15 1776 K Street, N.W.

Washington, D.C. 20006

16 202-719-7453

17 On behalf of iHeartMedia, Inc.

KELLOGG, HUBER, HANSEN, TODD,

18 EVANS & FIGEL, PLLC

MARK HANSEN, ESQUIRE

19 1615 M Street, N.W.

Suite 400

20 Washington, D.C. 20036

202-326-7992

21

On behalf of SiriusXM Radio:

22 ARENT FOX, LLP

PAUL FAKLER, ESQUIRE

23 1675 Broadway

New York, New York 10019

24 212-484-3900

25

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- 1 APPEARANCES (CONTINUED):
- 2 On behalf of National Public Radio:  
KING & SPALDING, LLP
- 3 KENNETH L. STEINTHAL, ESQUIRE  
101 Second Street
- 4 Suite 2300  
San Francisco, California 94105
- 5 415-318-1211
- 6 On behalf of Intercollegiate Broadcasting and  
Harvard Radio:
- 7 WILLIAM MALONE, ESQUIRE  
40 Cobbler's Green
- 8 205 Main Street  
New Canaan, Connecticut 06840
- 9 203-966-4770
- 10 On behalf of National Religious  
Broadcasters:
- 11 WILEY REIN, LLP  
KARYN ABLIN, ESQUIRE
- 12 1776 K Street, N.W.  
Washington, D.C. 20006
- 13 202-719-7008
- 14 On behalf of Educational Media Foundation:  
DAVID D. OXENFORD, ESQUIRE
- 15 WILKINSON BARKER KNAUER, LLP  
2300 N Street, N.W.
- 16 Suite 700  
Washington, D.C. 20037
- 17 202-783-4141
- 18 On behalf of College Broadcasters:  
CONSTANTINE CANNON
- 19 DAVID GOLDEN, ESQUIRE  
1001 Pennsylvania Avenue, N.W.
- 20 Washington, D.C. 20004  
202-204-4527
- 21
- 22
- 23
- 24
- 25

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1 ALSO PRESENT:

For SoundExchange:

2 Kelly Klaus, Melinda LeMoine, Martha  
Larraondo-Klipper, Rose Ehler, Anjan Choudhury,  
3 Colin Rushing, Jonathan Blavin, Jennifer Bryant,  
Kuruvilla Olasa, Rachel June Draper

4

For SiriusXM:

5 Jackson Toof, Martin Cunniff, Patrick Donnelly,  
Cynthia Greer

6

For NPR:

7 Joseph Wetzell, Ethan Davis, Antonio Lewis,  
Gregory Lewis

8

For Pandora:

9 Todd Larson, Christopher Harrison, Benjamin  
Marks, David Yolkut, Elisabeth Sperle

10

For iHeartMedia:

11 John Thorne, Tres Williams, Rob Wells, Donna  
Schneider, Evan Leo, Kevin Miller, Scott  
12 Angstreich, Caitlin Hall, Leslie Pope

13 For NAB:

Michael Sturm, Jennifer Elgin, Suzanne Head,  
14 Jillian Volkmar

15

Bonnie L. Russo, Capital Reporting Company

16

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1 (THIS BEGINS PUBLIC SESSION)

2 P R O C E E D I N G S

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6 CHIEF JUDGE BARNETT: Good morning.

7 Please be seated.

8 MR. HANSEN: I want to introduce

9 Leslie Pope and Evan Leo who are on our team.

10 CHIEF JUDGE BARNETT: Thank you.

11 MR. POMERANTZ: And, Your Honor, if I

12 may do the same. Ms. Rose Ehler from our firm

13 is joining us here today. You will get to know

14 her during the course of the proceeding, and

15 also Mr. Dave Jacoby, in-house counsel for Sony

16 Music and Mr. Jacoby is joining us here today.

17 CHIEF JUDGE BARNETT: Thank you. And

18 thank you for telling me how to pronounce Ms.

19 Ehler's name.

20 Welcome on this World Intellectual

21 Property Day. For those of you who aren't

22 critically involved in the hearing, from 10:00

23 to noon in the Montpelier Room on the 6th

24 Floor, there's going to be a world intellectual

25 property forum of some sort. You might have

1 some interest in it. Register Pallante is good  
2 about acknowledging these things and spreading  
3 around education for all.

4 I believe, Mr. Pomerantz, we are  
5 beginning with your client.

6 MR. KLAUS: Good morning, Your Honor.

7 I'm Kelly Klaus, and I'll be calling  
8 Mr. Kooker from Sony Music.

9 Before I do, Your Honor, I wanted to  
10 raise an issue about permissible scope of the  
11 direct testimony with Mr. Kooker; and, in  
12 particular, whether we may proceed to question  
13 him about the Apple agreement with Sony. And,  
14 in particular, the economic modeling that is a  
15 cornerstone of Professor Shapiro's supplemental  
16 rebuttal testimony, which was submitted last  
17 Monday. And it's not in his written direct or  
18 written rebuttal because of the restrictions  
19 that were placed on the use of that agreement.  
20 But we would ask -- and the services have  
21 opposed the request that we be able to cover  
22 this with Mr. Kooker on his direct.

23 CHIEF JUDGE BARNETT: Let me -- I  
24 think I know the answer.

25 Mr. Hansen, did you want to respond?



1 MR. HANSEN: Very briefly, Your  
2 Honor.

3 I think Mr. Klaus is forthright  
4 saying there isn't written direct testimony, not  
5 even a written rebuttal under the governance  
6 proceeding or reaffirmed by the panel as  
7 recently as of last week pursuant to Section  
8 351.10(b). The only oral testimony allowed to  
9 be presented here is an oral summary of the  
10 written direct testimony. New matter is not  
11 permitted as part of this proceeding, for very  
12 good reasons. We're entitled to know before the  
13 hearing what the testimony is going to be. So  
14 the rules prohibit it. There's no basis for  
15 departing from the rules, and it didn't belong  
16 back and forth about how the panel committed  
17 Professor Rubinfeld after the closing of the  
18 written testimony to supplement and the panel  
19 made resolutions about that matter to deal with  
20 that, but the panel, at the same time, said no  
21 one gets to file additional materials without  
22 permission of the panel.

23 So they could have, I suppose, sought  
24 permission to amend Mr. Kooker's written direct  
25 testimony. They didn't do so. They even as

1 recently as a few days ago, sent us a summary of  
2 what Mr. Kooker would cover that had no  
3 reference to any of this.

4 So to inject new matter against the  
5 rules at this part of the proceeding would be  
6 entirely unfair against the law, frankly, with  
7 no basis for adhering to the law and is  
8 prejudicial to us.

9 CHIEF JUDGE BARNETT: Thank you.

10 MR. KLAUS: I don't think it's  
11 prejudicial at all, Your Honor. They had the  
12 Apple agreements when they deposed Mr. Kooker.  
13 Their experts have now filed supplemental  
14 materials addressing them and, quite frankly, I  
15 think the services are being quite candid about  
16 this. If Mr. Kooker doesn't explain the  
17 modeling, then there is no witness from Sony who  
18 will be on record as having explained the  
19 modeling, which may suit the services as far as  
20 a tactical advantage, but it really doesn't heed  
21 the presentation of a full accurate record to  
22 the judges.

23 CHIEF JUDGE BARNETT: Thank you.

24 We will confer in the other room for  
25 a moment.

1 (Pause in proceedings.)

2 CHIEF JUDGE BARNETT: For purposes of  
3 this motion, I'm deferring to Judge Strickler,  
4 who will deliver the ruling of the judges.

5 JUDGE STRICKLER: The judges have  
6 decided that at this point the issue is not  
7 right with regard to whether or not the witness,  
8 Mr. Kooker, can testify with regard to the Apple  
9 licenses. The evidence with regard to the Apple  
10 licenses hasn't come in through the  
11 SoundExchange statements entry to rebuttal  
12 statements, and, as a consequence, we have  
13 concluded that those are -- that is rebuttal  
14 testimony. And to the extent any testimony may  
15 ultimately be permitted by a SoundExchange  
16 witness in response to the rebuttal testimony  
17 from the licensing services with regard to the  
18 Apple licenses, we will make a determination on  
19 that should such testimony be offered in the  
20 rebuttal proceeding.

21 But for purposes of the direct  
22 testimony by Mr. Kooker, he is not to be  
23 questioned with regard to the Apple licenses.

24 MR. POMERANTZ: Your Honor, may I  
25 just ask for one clarification?

1 Does that particular basis always  
2 exist, that is does it pertain to all witnesses  
3 in this first half of the case?

4 That is, you want to hear the Apple  
5 evidence in the second half of the case and all  
6 parties will present that evidence in the second  
7 half? So, for example, we have Professor  
8 Rubinfeld coming to testify either later this  
9 week or beginning of next week, and he can  
10 present that evidence now in the direct case, or  
11 we can wait to present it in the rebuttal case.  
12 I think we had had a discussion where we were  
13 all thinking we were presenting it in the direct  
14 case, but that's fine. We can present it in the  
15 rebuttal case. We'll do it whichever way Your  
16 Honor would prefer.

17 JUDGE STRICKLER: Subject to whatever  
18 stipulations you want to propose that we adopt,  
19 if evidence was presented in the direct case,  
20 that's what should be presented due to direct  
21 testimony. And if it was presented in the  
22 rebuttal case, then we'll wait for the rebuttal  
23 case.

24 MR. POMERANTZ: It's a little bit odd  
25 with respect to Apple because of when it was

1 submitted because it was -- it was in Professor  
2 Rubinfeld's rebuttal testimony, and then they --  
3 we unredacted it two days later, but I thought  
4 there was a ruling by Your Honors that deemed it  
5 as if it was submitted as part of our direct  
6 case.

7           We're just trying to have a  
8 meaningful joinder of the issues. Mr. Kooker,  
9 for example, is a rebuttal witness. So if, you  
10 know -- he can come back in our rebuttal case,  
11 and as long as he's permitted, assuming you deem  
12 it appropriate to respond to evidence that's  
13 come up early in the proceeding with respect to  
14 Apple, we can certainly have Mr. Kooker address  
15 it when he comes back in the rebuttal case. I'm  
16 really asking for guidance as to whether, for  
17 example, Professor Rubinfeld should be  
18 addressing the Apple agreements in the direct  
19 testimony or in the rebuttal testimony.

20           CHIEF JUDGE BARNETT: As I recall on  
21 our telephone conference, it was Mr. Hansen who  
22 was concerned that -- that the services be given  
23 an opportunity to respond to Dr. Rubinfeld's  
24 rebuttal, which means it would have to be  
25 presented as part of the direct case. And I

1 believe that was your request, Mr. Hansen.

2 MR. HANSEN: Your Honor, here is our  
3 request. I believe when you ruled, you said  
4 that Mr. Rubinfeld and only Mr. Rubinfeld's  
5 testimony could -- would be considered part of  
6 the direct case, even though he submitted it at  
7 the rebuttal phase. We are prepared to deal  
8 with that. That's fine. We'll cross-examine  
9 Dr. Rubinfeld.

10 What I don't want is the camel's nose  
11 in the tent here. They can't have Mr. Pomerantz  
12 say, well, then come back and do a rebuttal.  
13 They can't do rebuttal because there's no  
14 written rebuttal testimony from the witnesses,  
15 and we're not going to be able to offer evidence  
16 that they haven't put -- in other words, I think  
17 sufficient for today is we're on the written  
18 direct case. This witness can't give anything  
19 beyond his written direct testimony. I think  
20 we're agreed on that.

21 For Professor Rubinfeld, a different  
22 issue. I think we do expect him to talk about  
23 Apple, per your ruling. That is fine.

24 CHIEF JUDGE BARNETT: All right.

25 MR. HANSEN: What happens in the

1 rebuttal phase proceeding, I think you should  
2 preserve that issue for when it comes up and I  
3 think both sides will have their arguments at  
4 that time, but I don't want any advance rulings  
5 unless we have a whole record. What Mr. Kooker  
6 will say -- I don't think he can say it then and  
7 I don't think he will be able to say it then.  
8 We have today's ruling. We can deal with other  
9 issues.

10 CHIEF JUDGE BARNETT: Okay. Thank  
11 you.

12 Mr. Kooker is a fact witness. He can  
13 testify today if he -- I think after  
14 Dr. Rubinfeld's given direct and rebuttal, we  
15 may not need Mr. Kooker, but I'm not your  
16 strategist.

17 Mr. Joseph, you were on your feet, is  
18 that a me, too? Not allowed.

19 MR. JOSEPH: No. Actually, Your  
20 Honor, I think Mr. Hansen said it well. I was  
21 going to simply clarify. I was the one with  
22 respect to Dr. Rubinfeld who had wanted to be  
23 clear that the 3E and Apple testimony of  
24 Professor Rubinfeld, which had come in under  
25 special condition, special relief granted to the

1 services as a result of the fact that it came in  
2 late would be handled in a direct case and we  
3 would have the opportunity to rebut.

4 With respect to the fact witnesses,  
5 SoundExchange could have done the same thing  
6 they did with Professor Rubinfeld. We would  
7 have gotten special relief. They -- they are  
8 now trying to add in an extra, and I view the  
9 two circumstances as completely different. So  
10 that may be a me, too, but I just wanted to add.

11 CHIEF JUDGE BARNETT: Sounds like a  
12 me, too.

13 Mr. Rich, no.

14 MR. RICH: This is not a me, too.  
15 This is an addition on the subject of rebuttal.  
16 Another gating issue as it were with respect to  
17 the first witness's testimony for SoundExchange  
18 involves an effort on their part to rescrumble  
19 the egg which Your Honor has unscrambled in  
20 terms of dichotomist direct versus rebuttal  
21 testimony. I'm going to let my colleague, Mr.  
22 Larson, who's going to be cross-examining,  
23 explain what we learned yesterday about the  
24 proposed substance of the direct examinations  
25 this morning, and we think would be appropriate,



1 again as a general rule of application, to get  
2 some clarification around that issue if we may.

3 MR. POMERANTZ: Your Honor, that's  
4 a -- I just wanted to finish the loop on the  
5 Apple issue. We -- we were prepared to have  
6 Professor Rubinfeld address it in our direct  
7 case, and that's fine.

8 CHIEF JUDGE BARNETT: Okay.

9 MR. POMERANTZ: We would just -- we  
10 understand that you're deferring the issue as to  
11 whether Mr. Kooker and Mr. Wilcox from Warner  
12 can address it rebuttal after seeing the  
13 evidence. I think Professor Shapiro didn't use  
14 the right Sony model and Mr. Kooker can explain  
15 that. So he can explain which models they  
16 really relied on.

17 MR. HANSEN: Your Honor, I don't  
18 think we should be giving testimony here. I  
19 don't think we should have endless argument. We  
20 have the Court's ruling. We should be given  
21 fact testimony about what the experts will say.

22 MR. POMERANTZ: Your Honor, I'm  
23 making a proffer so Your Honors can understand  
24 the context here.

25 CHIEF JUDGE BARNETT: Let's just get

1 Mr. Kooker on the stand. I don't -- we don't  
2 need a proffer about what might or might not  
3 come along.

4 Mr. Rich?

5 MR. RICH: May Mr. Larson be heard on  
6 this second issue, Your Honor?

7 CHIEF JUDGE BARNETT: Mr. Larson is  
8 always welcome to speak.

9 MR. RICH: Thank you.

10 MR. LARSON: Thank you, Your Honor.

11 So, as Mr. Rich said, Your Honors  
12 ordered separate direct rebuttal phases. We  
13 received demonstratives last night from  
14 SoundExchange per the parties' agreement to  
15 exchange those demonstratives. And seven or  
16 eight of the ten demonstratives are taken  
17 directly from Mr. Kooker's rebuttal testimony.

18 And per the discussion we were just  
19 having, we wanted to get a ruling on that. I  
20 think it's going to apply to cross witnesses.  
21 We prepared for today, expecting Mr. Kooker's  
22 written direct testimony to be offered, not his  
23 written rebuttal testimony, and so we think it's  
24 unfair to the services and also outside the --  
25 technically outside the scope of the ruling that

1 was cited by Mr. Hansen's 351.10 meeting.

2 CHIEF JUDGE BARNETT: Thank you.

3 Mr. Klaus.

4 MR. KLAUS: Yes. To expedite things  
5 to get to Mr. Kooker, I think this is a nonissue  
6 because I actually don't plan to use the  
7 demonstratives that he's talking about.

8 CHIEF JUDGE BARNETT: Thank you.

9 MR. KLAUS: May I call Mr. Kooker,  
10 Your Honor?

11 CHIEF JUDGE BARNETT: Please.

12 MR. KLAUS: Your Honor, SoundExchange  
13 calls Dennis Kooker.

14 And, Your Honor, I should also say in  
15 line with our discussion about the  
16 demonstratives, this is good news. I think I  
17 will refer to very, very few of the exhibits  
18 that are in the binder. Perhaps, as we move  
19 along in these proceedings, we will be better at  
20 winnowing down our submissions.

21 JUDGE STRICKLER: May I ask you a  
22 question just before you begin. When I first  
23 looked at Mr. Kooker's testimony way back has  
24 that changed since then?

25 MR. KLAUS: It's the same written

1 direct statement from Mr. Kooker, and he's also  
2 submitted no amended testimony, and then he's  
3 got a written rebuttal testimony that we'll  
4 present later.

5 CHIEF JUDGE BARNETT: Mr. Kooker, I  
6 presume?

7 THE WITNESS: Yes.

8 CHIEF JUDGE BARNETT: Please stand  
9 and raise your right hand.

10 DENNIS KOOKER,  
11 being first duly sworn, to tell the truth, the  
12 whole truth and nothing but the truth, testified  
13 as follows:

14 CHIEF JUDGE BARNETT: Please be  
15 seated.

16 And if you could begin by stating  
17 your full name and spell your last name for the  
18 Court, please.

19 THE WITNESS: Sure. My full name is  
20 Dennis Carl Kooker, Jr. Last name K-O-O-K-E-R.

21 CHIEF JUDGE BARNETT: Thank you.

22 MR. KLAUS: And we passed out to  
23 Counsel copies of potential exhibits that we may  
24 use. And, Mr. Kooker, we've placed a copy in  
25 front of you, and I'll let you know where to

1 turn in the binder. And for the benefit of the  
2 counsel in the room, I'll just say that a number  
3 of the documents that are contained in the  
4 binder are designated restricted.

5 DIRECT EXAMINATION BY COUNSEL FOR SOUNDEXCHANGE

6 BY MR. KLAUS:

7 Good morning, Mr. Kooker.

8 A. Good morning.

9 Q. Sir, where do you work and what is  
10 your position there?

11 A. I work for Sony Music Entertainment,  
12 and I'm the president of the global digital  
13 business and U.S. sales group.

14 Q. What are the global digital business  
15 and U.S. sales group?

16 A. The global digital business is  
17 responsible for all of our digital revenue on a  
18 global basis. We're -- our teams within the  
19 global digital business include partner  
20 development, which is focused on our top 20  
21 global partners on the digital side of the  
22 business. The business development group, which  
23 is responsible for all new partners that come  
24 in, as well as new models with existing partners  
25 in getting those deals completed and into the

1 market. The U.S. sales team, which is  
2 responsible for all commercial activity, both  
3 digital and physical in the U.S. market. In  
4 addition to that, I have a legal and business  
5 affairs team that is focused primarily on the  
6 digital deals, but also a significant amount of  
7 efforts in that group are around antipiracy or  
8 anti-piracy efforts around the world and working  
9 with our government relations folks in key  
10 markets to ensure that our electrical property  
11 is protected.

12 Q. Are you a lawyer, sir?

13 A. No, I'm not a lawyer.

14 Q. And what are your responsibilities as  
15 the president of the global digital business and  
16 U.S. sales group?

17 A. Well, to start with, I'm responsible  
18 for leading a team of over 350 people; and in  
19 addition to that, accountable for revenues close  
20 to \$1.5 billion on a global basis; and driving  
21 and leading our digital strategy, and completing  
22 every major deal that we do with a digital  
23 service.

24 Q. And can you explain to the judges  
25 what it is that you do specifically in terms of

1 reviewing deals that you have with digital  
2 services?

3 A. Yes.

4 So as it relates to our deals with  
5 digital services, depending on the size of the  
6 deal, it may be that the deal is fully  
7 negotiated within my team, that they are  
8 reviewing the deal, is it progressing in the  
9 negotiations; and, ultimately, the majority of  
10 those deals would come to me for approval. For  
11 our larger deals, I may be more -- much more  
12 directly involved and likely much more directly  
13 involved in the actual negotiation of those  
14 deals, in approving those deals; and, if large  
15 enough, if they require CEO or even some board  
16 sign off, putting together the approval for  
17 recommendation for those deals.

18 Q. Of the major deals that Sony has done  
19 over the last five-year period, how many of  
20 those have you been involved in approving?

21 A. Most likely the majority of those  
22 deals.

23 Q. And whom do you report?

24 A. I report to Doug Morris, the CEO of  
25 Sony Music.

1 Q. Mr. Kooker, how long have you worked  
2 in the music industry?

3 A. I have worked for almost -- in the  
4 music industry for almost 20 years now.

5 Q. How long have you worked in Sony  
6 Music's Global Digital Business?

7 A. Probably for about the last six or  
8 seven years.

9 Q. If you could -- if I could ask you to  
10 open the binder that you have Mr. Kooker, you  
11 will see that the very first tab has your  
12 written direct testimony in it. It's  
13 SoundExchange Exhibit No. 12. I will just ask  
14 you if you could flip through it to the last  
15 page to verify that that's your signature?

16 A. Yes, it is.

17 Q. And is this your written direct  
18 testimony in these proceedings, sir?

19 A. Yes, it is.

20 Q. Okay. And, to the best of your  
21 knowledge, is it true and accurate?

22 A. Yes, it is.

23 MR. KLAUS: Your Honor, I would move  
24 the admission of SoundExchange Exhibit 12. It's  
25 the restricted version of Mr. Kooker's written



1 direct testimony.

2 CHIEF JUDGE BARNETT: Hearing no  
3 objection, Exhibit 12 is admitted.

4 (SoundExchange Exhibit No. 12 was  
5 admitted into evidence.)

6 CHIEF JUDGE BARNETT: And, Mr. Klaus,  
7 if you're going to be inquiring about restricted  
8 matters, you will let us know before you do.

9 MR. KLAUS: I will. What I attempted  
10 to do in my direct, Your Honor, is to cover all  
11 of the nonrestricted information first, put  
12 restricted information second. And, as you'll  
13 see, to the extent that I ask Mr. Kooker a  
14 question where there is a specific number that  
15 we have put into the restricted format, it may  
16 be most efficient to simply alert Your Honors as  
17 to where that is so that we can all read along  
18 with it rather than clearing the hearing room.

19 CHIEF JUDGE BARNETT: Thank you.

20 MR. KLAUS: Thank you.

21 BY MR. KLAUS:

22 Q. Mr. Kooker, your written direct  
23 testimony speaks in some detail to the  
24 investments that Sony Music makes in the  
25 creation of distribution of marketing of

1 recorded music. I would just like to ask you if  
2 you would summarize and explain to the judges a  
3 few of these points.

4 First, can you explain, generally,  
5 what Sony Music does to invest in the creation  
6 of recorded music?

7 A. Sure.

8 Well, the creative process for us is  
9 run through our artist and repertoire division,  
10 what we call A and R. And that A and R -- A and  
11 R teams are specialists, created specialists in  
12 finding talent and working with talent to  
13 produce the music that, ultimately, is the  
14 product that we bring to market. You know,  
15 their focus is in working very closely with the  
16 artists from the point of discovering new talent  
17 and they do that through listening to demo  
18 tapes, to watching performances, to using  
19 digital media tools to find new talent.  
20 Ultimately, they're also working with producers  
21 and studios to schedule time to make the  
22 recordings. And, again, have, you know, a very  
23 unique expertise in talent spotting.

24 Q. And what sorts of competition do they  
25 face in searching for new talent?

1           A.       It's an incredibly competitive  
2 environment. Obviously, when new talent is  
3 coming into the market and -- and, you know,  
4 they have -- they're working with managers, it's  
5 ultimately managers' job to create a competitive  
6 situation amongst different labels and record  
7 companies. And so there's competition for  
8 actually signing the artist in the first place.  
9 There's competition to get great songs for  
10 artists and for new recordings. There's  
11 competition for getting the best producers to  
12 work on the records, themselves. So it's a very  
13 competitive environment across that entire  
14 creative process.

15          Q.       And your written direct testimony at  
16 Page 4 provides some specific numbers on this  
17 that were designated as restricted because  
18 they're not publicly recorded. But could you  
19 provide the judges with a general sense of the  
20 magnitude of the investments that Sony Music  
21 makes in the process of finding and creating new  
22 music?

23          A.       Yes. It's in the hundreds of  
24 millions of dollars every year.

25          Q.       Your testimony also talks about what

1 Sony Music does to invest in the distribution of  
2 the recorded music that it creates, and would  
3 you please explain to the judges just briefly,  
4 generally, what is involved in distributing the  
5 recorded music that you create?

6 A. Sure.

7 Well, there's two primary methods.  
8 There's physical and digital. The physical side  
9 of the business that includes manufacturing the  
10 product, getting that product into warehouses,  
11 and from warehouses getting, it into brick and  
12 mortar retail.

13 On the digital side, it's ingesting  
14 that content. It's wrap ping the metadata that  
15 is required in order to efficiently move that  
16 product into our partners, our digital partners,  
17 and for that product to appear correctly to the  
18 consumer. That metadata is also very important  
19 on the digital side of the business, in  
20 particular, because it also contains information  
21 that allows the services to report back  
22 efficiently to us that we can -- we use that to  
23 then do our internal financial reporting and  
24 management reporting, as well as report on to  
25 our stakeholders like artists and producers.

1 Q. And what -- again, without going into  
2 the specific numbers that are restricted, what  
3 are the magnitude of the investments that you  
4 make in distributing your recorded music content  
5 on an annual basis?

6 A. With physical and digital combined,  
7 it's approaching a hundred million dollars a  
8 year.

9 Q. What does -- one of the other things  
10 that Sony Music does, I take it, is to market  
11 and promote the music that it creates and  
12 distributes.

13 What are the types of investments  
14 that Sony Music makes in that process of  
15 marketing and promotion?

16 A. So the marketing and promotion part  
17 of our business, you know, we are focused on  
18 gaining exposure for our artists, and there are  
19 a multitude of marketing activities that we  
20 perform to do that, including working with  
21 social media, advertising within social media,  
22 advertising online, advertising on radio and  
23 television, having artists appear at events,  
24 having artists appear on television, working  
25 with publicity departments to get articles and

1 reviews done by magazines and case makers.

2 Q. And what about promoting content  
3 within digital platforms, what does your team --  
4 what does your group do in that area?

5 A. So both our sales and our marketing  
6 team work very closely with our digital partners  
7 to position our products within those platforms.  
8 You know, I think where there's a -- often a  
9 misunderstanding is people think that because a  
10 platform is available online, therefore shelf  
11 space is unlimited; whereas, there are  
12 limitations in the physical world. But, in  
13 fact, from my experience, the shelf space on our  
14 digital partners is as limited as what you see  
15 on -- in the physical world.

16 And so while a platform may have all  
17 of the content, still how you -- how you  
18 position that content and present it to the  
19 consumer and how easy it is for the consumer to  
20 find it remains critically important. And it's  
21 very, very competitive to win the best  
22 positioning and promotional slots within our --  
23 our digital partners.

24 Q. How -- and the magnitude of the  
25 investments that you make in marketing and

1 promoting the recorded contents that you created  
2 and distributed, again, without going into  
3 specific numbers?

4 A. Yes. Again, it's in the hundreds of  
5 millions of dollars a year.

6 Q. How does Sony Music earn a return on  
7 these investments that you described?

8 A. Well, ultimately, it's critical that  
9 the revenue that -- that we are able to produce  
10 from the market -- from the -- from the consumer  
11 exceeds the investments that -- these  
12 investments that we're making, and also the  
13 investments we make and the overhead and the  
14 people who actually run the business for us.

15 Q. Okay. And how many products do you  
16 release into the marketplace on an annual basis?

17 A. On an annual basis, we release  
18 probably between 500 and a thousand albums a  
19 year. But within that -- and especially where  
20 the business is today where we have a physical  
21 business, we have a ringtone business, we have a  
22 streaming business, a video business, and a  
23 download business, we are making anywhere from  
24 100 to 200 products for every album released.  
25 So there's tens of thousands of products that go

1 into the market each year.

2 Q. And what is an example of such a  
3 product you make for an album release?

4 A. Well, an example would be that we  
5 would have an album release that would have  
6 bonus tracks for some retailers, but not all  
7 retailers. So each -- as a result, having  
8 different products for different retailers. In  
9 addition to that, we may make a ringtone for a  
10 couple of the singles. We'll make videos for a  
11 few of the singles that would be on the release,  
12 as well as creating unique content for different  
13 markets around the world.

14 Q. Now, of the new albums that you  
15 release on an annual basis, approximately how  
16 many are successful? How many return a net  
17 positive?

18 A. Well, I think when you -- when you  
19 look at it, probably best to split the business  
20 between established artists and new artists.  
21 And so for established artists where we have a  
22 track record of performance, it is easier to  
23 estimate and forecast what the results of future  
24 releases and sales and revenues of future  
25 releases would be. That being said, there



1 certainly are no guarantees that -- that future  
2 performance will be indicative of the past.

3           For new artists, it's much more  
4 speculative. And the new artist part of our  
5 business is really -- it's really the research  
6 and development of our business. This A and R  
7 process is a research and development. Our job,  
8 ultimately, is to -- is to make investments, you  
9 know, much like other R and D businesses  
10 industries do around the world. We're making  
11 investments to ultimately look and hope that we  
12 have a couple of major hits that break out of  
13 it.

14       Q.       And what happens to Sony Music's  
15 business if you can't make a return on the  
16 investments that you made?

17       A.       Well, ultimately, we would have to  
18 invest less and that would be less, obviously,  
19 in the talent side of the business and in the  
20 marketing and promotion, and we would also have  
21 to reduce our overhead.

22       Q.       One of the things that you describe  
23 in some detail in your written testimony is the  
24 shift from what you described as ownership to  
25 access models, and I would like to turn to that

1 subject now.

2 And, Mr. Kooker, if you can  
3 describe -- you've been in the music business  
4 for 20 years. How has the process of getting  
5 your music to consumers changed over that  
6 20-year period?

7 A. Quite dramatically. Twenty years ago  
8 when I started in the business, the primary  
9 method for getting product to market was  
10 physical distribution, physical distribution  
11 into brick and more retail. And while that  
12 remains an important part of our business  
13 overall, there are many other channels of  
14 distribution and ways to get product into the  
15 market and to consumers, again, including the  
16 download business, which has been, you know, an  
17 important part of our business for about 11 or  
18 12 years now. After the start of the download  
19 business, we had the introduction of the  
20 ringtone business, which grew quickly, peaked,  
21 and has been in decline since then. And then  
22 the introduction of the streaming business.

23 Q. And was the -- just within the time  
24 period you have been in the music business, was  
25 the download business free? For example, the

1 iTunes store, was that preceded by a period of  
2 free downloading in the marketplace?

3 A. Yes. As part of this major  
4 transformation that our business has gone  
5 through, moving from physical to digital, you  
6 know, where technology was both a disruptor and  
7 an opportunity, the disruption point meant that  
8 it was very easy for consumers to pirate our  
9 music and our content. And, you know -- and, as  
10 a result, as part of that transition, you know,  
11 we have seen a decline in revenues since that  
12 transition started.

13 Q. And has the free availability of  
14 music and pirate services continued throughout  
15 the period you've been in the digital global  
16 business?

17 A. Absolutely.

18 Q. Now, could you describe, in general  
19 terms, what is involved in the change from an  
20 ownership to an access model, as you've  
21 described it in your written testimony?

22 A. Absolutely.

23 In an ownership model, ultimately,  
24 what we our focused on is trying to get  
25 consumers to buy a piece of product. In an

1 access model, what we are trying to do is  
2 present a service that is compelling enough to  
3 consumers that, ultimately, they would pay to  
4 have that service available to them on a month  
5 in month out basis.

6 Q. And what is the current breakdown of  
7 Sony's revenues between physical on the one hand  
8 and digital on the other?

9 A. In the U.S., for our fiscal year that  
10 just ended in March, 72 percent of our revenue  
11 came from digital; 28 percent from physical.

12 Q. And within the digital side, what is  
13 the approximate breakdown between the download  
14 business on the one hand and the streaming  
15 business on the other?

16 A. Again, in the U.S., which is still  
17 download heavy, about 60 percent of the business  
18 revenue is from download and 40 percent from  
19 streaming.

20 Q. And you testified here for a  
21 different group of judges in 2010; is that  
22 right, sir?

23 A. Yes, I did.

24 Q. Okay. How -- and if you could just  
25 describe how the proportion of your business,

1 the split in your digital business between  
2 downloads and streams, how has that changed over  
3 the last five years?

4 A. Well, again, pretty dramatically. I  
5 think the last time I was here, the predominant  
6 amount of our revenue on the digital side  
7 probably well over 90 percent came from the  
8 download business. So it has been a pretty  
9 quick shift towards streaming.

10 JUDGE STRICKLER: Counsel, can I  
11 interject.

12 Mr. Kooker, you said streaming  
13 accounts for 40 percent of revenues?

14 THE WITNESS: Forty percent of our  
15 digital revenues.

16 JUDGE STRICKLER: Of the digital?

17 THE WITNESS: Yes.

18 JUDGE STRICKLER: Within that 40  
19 percent, what percentage is in the interactive  
20 market and what percentage is in the  
21 noninteractive market, if you know?

22 THE WITNESS: Off the top of my head,  
23 I don't know specifically. My guess is it's  
24 probably 60/40 towards our directly-licensed  
25 partners.

1 JUDGE STRICKLER: Meaning  
2 interactive?

3 THE WITNESS: Yes.

4 JUDGE STRICKLER: Thank you.

5 MR. KLAUS: Thank you, Your Honor.

6 BY MR. KLAUS:

7 Q. And, Mr. Kooker, just on the  
8 subject -- sticking with the subject of your  
9 download business for a moment, what do you --  
10 what have seen happening in that download  
11 business and what do you see happening over the  
12 next five-year rate period?

13 A. Over about the last 18 to 24 months,  
14 we have seen a decline in -- in our download  
15 business. And, at this point, in the public  
16 projections that we have put out through our  
17 investor relations group, our forecast is that  
18 the download business is going to continue to  
19 decline into the foreseeable future.

20 Q. And in terms of your total, total  
21 overall revenues, what are the consequences, if  
22 any, of the shift from a download business to a  
23 more streaming-focused revenue-generating  
24 business?

25 A. Well, certainly, over the last five

1 years, what we have seen is continued decline in  
2 revenue overall, a flattening out in the last  
3 couple of years. And so, you know, again, as we  
4 move through yet another transition for our  
5 industry, moving from ownership to access, you  
6 know, what we're seeing is that it is very hard  
7 to replace the existing business at a faster  
8 rate than what that business is declining.

9 Q. And on the music consumption side,  
10 what have you seen in the market in terms of the  
11 consumption of your musical content?

12 A. What we have seen is that our  
13 consumption continued -- the consumption of  
14 music continues to increase and increase at a  
15 very healthy pace.

16 Q. Okay. And what -- could you describe  
17 in some greater specificity for the judges what  
18 you mean by seeing that consumption increase?

19 A. Well, you know, what -- ultimately,  
20 what we're seeing is that there is a high demand  
21 for our product, and as it is easier and easier  
22 for consumers to access music, we're seeing  
23 greater and greater consumption. So from a  
24 simple economic standpoint, if you were looking  
25 at a business where product was in high demand,

1 you would usually expect to see revenue growing.  
2 And, in fact, we haven't been able to see that.  
3 It's -- you know, our revenue has declined for  
4 over a decade at this point. And so, at this  
5 point, what we're seeing is -- you know, the  
6 good news is, is high demand for the product  
7 from a consumption standpoint, but still  
8 struggling to monetize that at a rate that  
9 actually produces growth.

10 Q. And are you seeing high demands in  
11 the streaming market, specifically?

12 A. Absolutely. I think the streaming  
13 market is responsible for this growth in  
14 consumption.

15 Q. Now, over the last several years,  
16 you've described some of the increases in the  
17 consumption streaming.

18 What have you seen in terms of the  
19 development of the number of businesses that are  
20 streaming your musical content?

21 A. Well, we continue to see a lot of new  
22 players coming to the market. We are regularly  
23 weekly meeting with new businesses who are  
24 looking to enter the market, and I also know  
25 that, you know, the number of licensed partners



1 through SoundExchange continues to grow, as  
2 well.

3 Q. And with respect to -- I think you  
4 described it in response to Judge Strickler's  
5 question, your directly-licensed partners,  
6 parties who don't operate on a statutory  
7 license, how have the numbers of those increased  
8 over the last -- since you were here in 2010?

9 A. Well, I don't recall exactly how many  
10 licensed partners we had at the time, but I know  
11 today we're at about 450 licensed partners on a  
12 worldwide basis.

13 Q. And, Mr. Kooker, what do you and your  
14 team do to keep current with developments in the  
15 streaming space?

16 A. Well, first off, we are in this  
17 business every single day of the week talking to  
18 partners who are running the services, analyzing  
19 the information that we are provided from those  
20 partners about the performance of the business.  
21 We are regularly doing research both internally  
22 and externally, qualitative as well as  
23 quantitative research. It is an industry that's  
24 interesting, I think, from a press coverage  
25 standpoint. So there's a lot of information

1 available in the press, as well as a number of  
2 publicly-traded companies that are available  
3 where information is available. So it is -- you  
4 know, it's critical that our team is immersed  
5 every day of the week in understanding where the  
6 market is and where the market is going.

7 Q. And what about the services that  
8 operate that you don't directly license and  
9 operate under the statutory license? What, if  
10 anything, do you and your team do to stay  
11 current on what the features are that they are  
12 offering?

13 A. You know, similarly, we are using  
14 these services just like we do with our  
15 directly-licensed partners to make sure that we  
16 understand the functionality and what the user  
17 experience overall is. Again, where they're  
18 publicly-traded companies, there's, obviously,  
19 public information that is available. We can  
20 follow metrics, benchmark those metrics across  
21 other parts of our business. And, again, you  
22 know, these are companies that are covered well  
23 in the presses, as well.

24 Q. Why do you spend time monitoring the  
25 developments or offerings of services when you

1 don't have a direct relationship?

2       A.       Ultimately, they're a critical part  
3 of the overall ecosystem. It -- you know,  
4 clearly, there are a lot of music consumers in  
5 the statutorily licensed services and  
6 understanding what those music consumers are  
7 doing, what's important to them is critical for  
8 our business.

9       Q.       And how has this transition from an  
10 ownership model to more of an access or  
11 streaming model, how has that affected your  
12 ability to earn a return on the types of  
13 investments you described in creating and  
14 distributing content?

15       A.       Well, whenever you go through a  
16 transition, it's -- it is challenging. And, you  
17 know, what we have found in our industry is  
18 through each of the major transitions that we  
19 have gone through, that it is -- it is difficult  
20 to monetize the new direction that the consumer  
21 is going at a rate that is replacing faster the  
22 existing business that's declining.

23       Q.       And what measurement do you use  
24 within the Global Digital Business group to  
25 assess the type of return on investment that you

1 are realizing there?

2 A. Well, another part of this shift,  
3 from ownership to access, has meant that we've  
4 had to shift the metrics that we use to analyze  
5 the business. And, in the past, it was -- our  
6 business was very focused on transactions, on  
7 sales, how many transactions did you make, how  
8 many albums did you sell.

9 Now, with an access model, we're much  
10 more focused on average revenue per user, ARPU.  
11 How much revenue are we able to collect per user  
12 for the use of the service and for the use of  
13 the content.

14 Q. And can you just give us an example  
15 of what you mean when you say ARPU? Can you  
16 give us relative examples between the download  
17 business on the one hand and the streaming  
18 business on the other?

19 A. Sure.

20 So, you know, the ARPU for the  
21 download business on a wholesale basis is around  
22 \$50 a year that we receive from the consumer.  
23 For the paid subscription business, it's about  
24 \$70 a year. So if you look at that comparison,  
25 if we were able to shift the buyers all into the

1 paid subscription world, we would have a growing  
2 business. But on the other side of it, of the  
3 paid business, is the ad-supported business.  
4 And the ad-supported ARPUs we estimate to be in  
5 about the \$4 range per year on a wholesale  
6 basis.

7 Q. And when you say the ad-supported  
8 side of the business, what are you talking about  
9 there?

10 A. Well, I'm talking about services that  
11 have -- that offer a free-to-the-consumer  
12 product that is monetized through advertising.

13 Q. And are you including within that  
14 description and within the ARPUS that you  
15 describe of \$4 a year, both directly-licensed  
16 partners and those who operate under the  
17 statutory license?

18 A. Yes, I am.

19 Q. Can you describe, Mr. Kooker, some of  
20 the -- I take it one of your goals in this  
21 business is trying to get people to move from  
22 the lower ARPU offering to a higher ARPU  
23 offering?

24 A. Yes, it's critical.

25 Q. And what challenges does Sony Music

1 face in trying to get consumers to move from a  
2 lower ARPU offering to a higher ARPU offering?

3 A. Well, I think, first, you know,  
4 it's -- it's challenging to convince a consumer  
5 to open their wallet and pay for something that  
6 is very similar to something that is available  
7 to them for free. So, you know, convincing or  
8 providing that value ad that gets consumers to  
9 open their wallet is critical and difficult.

10 Q. Okay. And why do you say that there  
11 is competition for free?

12 A. I'm sorry?

13 Q. I'm sorry.

14 You said that it's difficult to get  
15 people to pay for something that is very similar  
16 to what they're getting for free?

17 A. Right.

18 Q. What is -- why do you think --  
19 explain what that difficulty is.

20 A. Well, I think when you look at many  
21 of the ad-supported offerings out there, you  
22 know, the service that is provided to the  
23 consumer is near on demand, and it's also  
24 provided with a very low ad load. And so the  
25 differentiation that most paid services have,

1 which is removing ads, and it's -- is lost. And  
2 having a near or having the ability to have an  
3 on-demand experience and having a near on-demand  
4 experience in the ad-supported tiers means that  
5 it's -- it's, again, very difficult to convince  
6 the consumer to pay an upgrade.

7 Q. And your written testimony, this is  
8 your written direct testimony, describes a  
9 number of examples of -- you called convergence  
10 or also the sort of the blurring of  
11 differentiation lines.

12 Can you just give some examples to  
13 describe what you mean by that, sir?

14 A. Sure.

15 Well, I think, first, you know, what  
16 we see in ad-supported tiers and especially, I  
17 think, in the statutory license services is, you  
18 know, a customization of what is played for the  
19 consumer, a customization that the consumer is  
20 able to -- to steer through favoriting [sic] or  
21 disliking certain content, an experience that  
22 the consumer is able to steer by including  
23 favorite artists, by including favorite songs,  
24 and, as a result, also often having, you know,  
25 their playlists or algorithm then front loading

1 that favorite type of music that they're looking  
2 at.

3 Q. And what are you seeing conversed on  
4 the non-directly licensed ad-supported statutory  
5 site? What are you seeing in terms of the types  
6 of functionality that's being offered on the  
7 on-demand or director license side of the  
8 business?

9 A. Well, what we're seeing is that there  
10 is definitely a move towards more of editorial  
11 and programming within those services.  
12 Ultimately, there's a lot of debate about lean-  
13 forward-type versus lean-back-type experiences.  
14 And my experience in working this business for  
15 20 years is that music consumers are usually  
16 both. There is an element of lean forward and  
17 an element of lean back for every consumer, even  
18 the most avid music consumer, at times, wants a  
19 lean-back experience. And so the  
20 subscripitive -- paid subscription services have  
21 been focused on building out their capabilities  
22 to provide what is a great lean-back experience  
23 to complement that lean-forward experience that  
24 they provide.

25 JUDGE STRICKLER: Excuse me. A



1 question for you, sir.

2           You say it's your experience in the  
3 music business that consumers are both lean back  
4 and lean forward. What is the foundation for  
5 that? Is it anecdotal in the course of your  
6 business, or are you relying on your  
7 recollection of particular research or studies  
8 to come to that conclusion?

9           THE WITNESS: Probably more anecdotal  
10 in just the way -- I mean, we have a lot of  
11 information about consumer behavior, and we look  
12 at, for example, what people are doing within  
13 our paid subscription services and understanding  
14 that a lot of the growth in place is happening  
15 within playlists. Understanding that new  
16 entrants are coming into the market where  
17 they're focused -- their marketing angle is that  
18 they're -- you know, they're focused on human  
19 curation because, ultimately, they believe  
20 that -- that, you know, consumers are looking  
21 for a better curation experience within these  
22 paid services.

23           JUDGE STRICKLER: I want to explore  
24 just a little bit more your answer with regard  
25 to my question about anecdotal. I mean, because

1 we have other witnesses who will be coming in on  
2 both sides who are licensee with regard to  
3 consumer surveys and consumer preferences and  
4 the like.

5               So your testimony in that regard, is  
6 that based on your recollection of surveys and  
7 studies you have seen, or you say you have a  
8 knowledge or an understanding of how consumers  
9 feel generally? And I'm trying to find out what  
10 is the foundation for that conclusion? So I  
11 guess my question, really, is: Where does that  
12 anecdotal -- what is the basis for that  
13 anecdotal.

14               THE WITNESS: Well, I do know from  
15 research, which I may not be able to  
16 specifically reflect the exact research at this  
17 point, but I do know from research that  
18 lean-back experiences are very, very important  
19 to consumers. But in addition to that, I also  
20 know the information on the data that we receive  
21 from the services, themselves, and it's clear  
22 that, you know, when people have the ability to  
23 have everything they want on demand, that that  
24 play listing and curation remains an incredibly  
25 critical part.

1           In research that we do discovery is  
2   an incredibly important part of the consumer  
3   experience with music, and that discovery is  
4   usually prompted in some way by either word of  
5   mouth from friends or social media or from what  
6   the services, themselves, are presenting to  
7   consumers, and consumers often rate services  
8   more positively or negatively based on that  
9   discovery experience.

10           JUDGE STRICKLER: So, then, your  
11   anecdotal evidence is based on your experience  
12   in the industry having reviewed data and  
13   reviewed research?

14           THE WITNESS: Yes.

15           JUDGE STRICKLER: To come to that  
16   conclusion?

17           THE WITNESS: Yes.

18           JUDGE STRICKLER: Thank you, sir.

19           MR. KLAUS: Thank you, Judge.

20           BY MR. KLAUS:

21           Q.     Maybe I can close the loop on this  
22   just so there is no confusion in the record.

23                   When you say, "anecdotal," are you --  
24   is that something that's sort of a casual  
25   mention that you've heard, or are you basing

1 this on data research reporting?

2 A. Data research and recording. I keep  
3 making the mistake of if I can't speak to the  
4 specific research of saying that it's more  
5 anecdotal.

6 Q. Okay. Also, you --

7 MR. KLAUS: Do you have any other  
8 questions, Your Honor?

9 JUDGE STRICKLER: No.

10 MR. KLAUS: Thank you.

11 BY MR. KLAUS:

12 Q. Mr. Kooker, I think one of the things  
13 you also described as moving in differentiation  
14 between statutory services and your  
15 directly-licensed partners in this space is the  
16 phenomenon of mobile?

17 A. Yes.

18 Q. And contents on mobile.

19 Could you please describe that?

20 CHIEF JUDGE BARNETT: Tilt that mic  
21 over, please.

22 BY MR. KLAUS:

23 Q. Mr. Kooker, could you describe what's  
24 going on in your development space?

25 A. Yeah. Well, again, when we talk

1 about this transition from ownership to access,  
2 you know, again, what is happening with our  
3 business is similar to the transition that we  
4 went through from physical to digital because  
5 it's being enabled by two -- the same two  
6 things, which is technology on one hand and  
7 consumer demand and behavior on the other hand.

8           And, in particular, the piece of  
9 technology that is driving the move towards  
10 access is mobile. And the ability to access  
11 your music anywhere anytime and access your  
12 service at anywhere at anyplace at any time.  
13 And so the ability to access music on mobile is  
14 an incredibly important function. And, in fact,  
15 was the primary upsell method that we used to  
16 launch the business in Europe. In the U.S.,  
17 unfortunately, we can't use that same  
18 differentiator because mobile is something that  
19 is available under the statute in non-licensed  
20 services.

21       Q.       And could you describe what you mean  
22 by "upsell"?

23       A.       Oh, upsell would be moving people out  
24 of an ad-supported tier and into a paid tier.

25       Q.       As a result -- in the United States,

1 as a result of the convergence, the lack of  
2 differentiation that you've described, what are  
3 you seeing as a result in the marketplace in  
4 terms of your ability to move consumers from low  
5 ARPU offerings to higher ARPU offerings?

6 A. Well, in particular, we're seeing  
7 that it is very challenging to move people into  
8 paid subscription, and -- and I know that  
9 because I look at our benchmarks around the  
10 world. And so if you compare the U.S. market,  
11 which is, again, 72 percent digital with a  
12 market that has a similar ratio of  
13 digital/physical like Sweden where it's 82  
14 percent digital, in the U.S., we only have 3  
15 percent penetration on paid subscription  
16 business; whereas, in Sweden, we have 20  
17 percent.

18 To flip that, if you look at a market  
19 like Germany, which is a late adopter market,  
20 only 24 percent of our revenue in Germany is  
21 digital. However, the same 3 percent  
22 penetration on subscription we have in the  
23 German market as we have in the U.S. market.

24 Q. What conclusions have you drawn from  
25 your knowledge of this global basis about

1 development within the U.S. market?

2 A. Right.

3 What we do know is that ad-supported  
4 services that have a high level of consumption  
5 like YouTube are common in all of these markets.  
6 One big differentiator is large ad-supported  
7 services through statutory license services,  
8 which we don't have in the other markets.

9 Q. Mr. Kooker, there has been a lot of  
10 -- there will be -- there has been, there will  
11 be a lot of discussion about issues of motion  
12 and substitution in these proceedings. You  
13 discussed this in your testimony and written  
14 testimony. If you could describe, in general,  
15 for the judges what your experience the shift  
16 from the ownership to the access model has meant  
17 to Sony Music for purposes of concepts like  
18 promotion and substitution?

19 A. Well, I think as it relates to  
20 promotion, it's something that we're still  
21 getting our arms around, because, in reality, it  
22 requires complete reengineering of our business.  
23 The way that we historically have gone to market  
24 is to focus on promotion at Terrestrial radio,  
25 taking our best content, making it available as

1 part of the awareness building process, to  
2 hopefully get a small number of people to  
3 convert and actually go out and purchase an  
4 album at the time of release.

5           When you think about the way that the  
6 access model and the access business is  
7 structured, ultimately, our revenue is driven by  
8 the consumption, itself; and therefore, the most  
9 valuable content is, therefore, the most popular  
10 most in demand content. And so shifting from,  
11 you know, thinking about making that content  
12 available to the consumer to drive to a sale  
13 actually is a completely wrong way to think  
14 about the access model. Ultimately, the  
15 consumption is the end game and shifting the way  
16 that we handle our promotion to drive people to  
17 that revenue-bearing consumption activity is  
18 incredibly important.

19           Q.       And your prior answer referred to  
20 promotion with Terrestrial radio as part of the  
21 awareness building process.

22                   What do you mean by that?

23           A.       Well, one of the things that we need  
24 to do whenever a new release is coming out from  
25 an artist is get the public to be aware that the



1 music is even in the marketplace, and  
2 Terrestrial radio, historically, has been one of  
3 the pieces to a marketing and promotion plan in  
4 building that awareness.

5 Q. What are some of the other pieces of  
6 that awareness building plan?

7 A. Publicity, social media, having  
8 artists perform on television within television  
9 programs, touring as well for certain artists is  
10 incredibly important.

11 Q. And in terms of what you described as  
12 the new focus on promoting and driving people to  
13 revenue bearing, revenue-generating consumption  
14 activity, what have you seen in your analysis of  
15 the marketplace evidence that tells you that --  
16 what does that tell you about statutory  
17 services, free ad-supported offerings driving  
18 consumers to higher ARPU offerings?

19 A. We have very little evidence that  
20 shows that ad-supported offerings that aren't  
21 directly linked to an upsell paid subscription  
22 tier have -- are driving people into other  
23 services that have paid subscription tiers.

24 MR. KLAUS: Your Honor, I'm about to  
25 turn to -- for the last part of my

1 examination -- material that's been designated  
2 restricted. This would be a good time to --

3 CHIEF JUDGE BARNETT: Thank you, Mr.  
4 Klaus.

5 If there is anyone in the courtroom  
6 who is not a party to a protective order or who  
7 has not signed a non-disclosure certificate,  
8 please wait outside. And will the last person  
9 out move the closed session sign to the outside  
10 of the door when you close it.

11 Thank you.

12 MR. KLAUS: Your Honor, the  
13 restricted information that I'm going to  
14 describe is entirely the property of Sony Music.  
15 Sony Music's counsel is in the courtroom. May  
16 they stay?

17 CHIEF JUDGE BARNETT: Yes.

18 MR. KLAUS: Thank you.

19

20 (THIS ENDS PUBLIC SESSION)

21 (RESTRICTED SESSION BOUND SEPARATELY)

22

23

24

25

1 (THIS BEGINS PUBLIC SESSION)

2

3 CROSS-EXAMINATION BY COUNSEL FOR NAB

4 BY MR. STURM:

5 Q. Good morning, Mr. Kooker.

6 I'm Michael Sturm. I represent NAB,  
7 and we met at your deposition.

8 A. Good morning.

9 Q. I understand you have been with Sony  
10 for about 11 years; is that right?

11 A. No. I've been with Sony Music and  
12 its predecessors for almost 20 years.

13 Q. Are you also on the RIAA board?

14 A. I am, yes.

15 Q. And how long have you been on that  
16 board?

17 A. Probably five years.

18 Q. Do you have your written direct  
19 testimony, which is Exhibit 12, in the big  
20 binder, not the one I just gave you?

21 And, actually, do you have the cross  
22 exhibits?

23 A. No.

24 Q. Okay.

25 A. Well, unless they're in this binder.

1 Q. No, it'll be a separate binder, so I  
2 will have someone hand them to you.

3 CHIEF JUDGE BARNETT: Here is the  
4 binder.

5 MR. STURM: Thank you.

6 CHIEF JUDGE BARNETT: I'm sorry.  
7 While we're taking care of this, there's a chair  
8 blocking the door back there in the center of  
9 the room. It's going to need to be moved.  
10 Thank you.

11 BY MR. STURM:

12 Q. Do you have your written direct  
13 testimony? That's in the big binder. Sorry. I  
14 will try to avoid going back and forth too much.

15 A. No problem.

16 Q. It's the first tab.

17 A. Right.

18 Q. And is that SoundExchange Exhibit 12?

19 A. Right.

20 Q. So Page 3 of your direct testimony  
21 you talk about the A and R department at Sony.

22 Do you see that testimony?

23 A. Yes.

24 Q. And you don't have direct  
25 responsibility for that part of the business, do

1 you?

2 A. Correct.

3 Q. Okay. That organization doesn't  
4 report to or up through you, correct?

5 A. That's correct.

6 Q. The next couple of paragraphs you  
7 talk about recording songs and costs that are  
8 incurred in recorded songs.

9 Do you see that testimony?

10 A. I do, yeah.

11 Q. Okay. That organization, likewise,  
12 doesn't report up to or through you, correct?

13 A. Which part of the organization?

14 Q. The recording songs.

15 A. No, it does not.

16 Q. Okay. And so you gave some testimony  
17 earlier today about how that part of the  
18 business is very competitive, a very competitive  
19 environment. But that's not a competition that  
20 you're directly involved in, correct?

21 A. I am not directly involved in it, no.

22 Q. And flipping over to the next page,  
23 Page 4, you talk about manufacturing costs for  
24 your physical products?

25 A. Yes.

1 Q. Is that in a -- is that part of the  
2 business that reports to you?

3 A. Yes. The inventory team reports --  
4 is part of my group, yes.

5 Q. How about -- then you go on to  
6 manufacturing and distribution costs. Excuse  
7 me. Go on to the marketing and promotion.

8 Does that area report to you?

9 A. No. The marketing and promotion from  
10 the labels does not report to me.

11 Q. At the bottom of Page 4, carrying  
12 over to Page 5, you say: "The marketing plan  
13 for any project that generally include a variety  
14 of components and promotion and eliciting social  
15 media, live tour support, video promotion, and  
16 grand sponsorship, as well as traditional media  
17 like print and TV advertising."

18 Do you see that testimony?

19 A. I do, yes.

20 Q. So you don't mention radio promotion  
21 in that sentence, right?

22 A. No, I don't.

23 Q. Okay. But you are certainly -- as  
24 you indicated in your direct testimony, you're  
25 aware that Sony promotes on radio, right?

1 A. I am aware of that, yes.

2 Q. And I think on direct you mentioned  
3 that historically you have promoted through  
4 radio, but, in fact, Sony still promotes through  
5 the radio, right?

6 A. That's correct.

7 Q. And you still, in fact, spend more  
8 money on radio than any other kind of promotion,  
9 right?

10 A. I'm not sure.

11 Q. You don't know one way or the other?

12 A. Not definitively, no.

13 Q. Is it your belief that you do spend  
14 the most on radio?

15 A. No. We spend quite a bit on video  
16 promotion, as well.

17 Q. Do you know Julie Swidler?

18 A. I do, yes.

19 Q. She works with you?

20 A. Yes, she does.

21 Q. And she is the executive vice  
22 president, business affairs and general counsel  
23 for Sony?

24 A. Correct.

25 Q. Okay. If she said in a declaration

1 that was filed in this case that there are  
2 currently well over a hundred employees in the  
3 radio promotion departments at Sony Music's  
4 major labels, you wouldn't have any basis to  
5 question that testimony, would you?

6 A. No, I wouldn't.

7 Q. Page 9 of your written direct  
8 testimony mentions -- I don't know that you  
9 necessarily need to flip through it for this  
10 question, but it mentions that there used to be  
11 six major record companies in the U.S.?

12 A. Yes.

13 Q. Okay. And, today, we're down to  
14 three: You, Warner, and Universal, correct?

15 A. Yes.

16 Q. And Sony's music -- Sony's share of  
17 the market, according to Page 3 of your  
18 testimony, is 28.2 percent for CDs and 26.5  
19 percent for digital albums; is that right?

20 A. Right.

21 Q. And Universal is greater than that,  
22 right? Did I misread something?

23 MR. KLAUS: No. I was checking to  
24 see if you were getting into restricted  
25 testimony. My apologies.



1 BY MR. STURM:

2 Q. So, is it your understanding  
3 Universal's market share is even bigger than  
4 yours?

5 A. Yes, it is.

6 Q. Okay. And Warner is a little bit  
7 smaller?

8 A. Yes.

9 Q. Now, you were involved -- I think you  
10 testified on direct that you have approved the  
11 majority of the direct license deals; is that  
12 right?

13 A. Yes.

14 Q. Okay. And are you -- are you  
15 personally involved to some extent in the  
16 negotiation of those direct deals?

17 A. It depends. It depends on the size  
18 of the deal and the nature of the deal how  
19 involved my -- how directly involved I am in  
20 that specific negotiation.

21 Q. So you're more involved in bigger  
22 deals; is that fair?

23 A. Tend to be, yeah.

24 Q. And that's -- over what period of  
25 time have you been either negotiating or

1 approving these direct deals?

2 A. Over the past three-and-a-half years.

3 Q. And over all that time, you, Sony,  
4 have never lowered your proposed rate in  
5 response to a proposed -- a proposal by another  
6 major label, correct?

7 A. No.

8 Q. You're saying you have never lowered  
9 it, or that's incorrect?

10 A. Sorry. Never lowered it. We're not  
11 negotiating with our competitors.

12 Q. Okay. So you have never lowered your  
13 proposed rate to another service in response to  
14 a proposal by another major label, correct?

15 A. I don't know proposals from the other  
16 major labels.

17 Q. Well, do the -- when you're  
18 negotiating these prospective licensees, do they  
19 ever tell you we've got a proposal from another  
20 label that's better than yours? Does that ever  
21 happen?

22 A. It always happens.

23 Q. Okay. And have you ever -- have you  
24 ever lowered your rate in response to such a  
25 statement by a proposed licensee?

1 A. Absolutely not.

2 Q. And you have also never lowered your  
3 proposed rate in order to get more plays from  
4 another service, correct?

5 A. No.

6 Q. So you've never cut the price that  
7 you're offering, either, to respond to a  
8 competitor label's price or to get more plays  
9 for Sony, correct?

10 A. I have never cut -- we've never cut  
11 our price responding to a competitor's proposal  
12 or for more plays.

13 Q. Could you look, please, again at your  
14 written direct testimony, Page 15?

15 You have it there?

16 A. Yes.

17 Q. Okay. I'm looking at the second  
18 paragraph from the bottom, the one that starts  
19 "as noted."

20 Do you see it there?

21 A. I do, yes.

22 Q. Okay. So you say in here -- this is  
23 the second sentence -- "One of the original  
24 justifications for allowing statutory services  
25 to pay these lower rates was that the offering

1 under the statutory license would provide a user  
2 experience similar to Terrestrial radio."

3 Did I read that correctly?

4 A. Yes, you did.

5 Q. Okay. And so -- and you're saying  
6 you have knowledge of that fact and you're  
7 declaring it is true under penalty of perjury,  
8 right?

9 A. I have a general understanding that  
10 this is the part of the justification, yes.

11 Q. Then the next -- so nothing to  
12 contradict that, right? You believe that to be  
13 true?

14 A. I believe that to be true.

15 Q. All right. Then the next two  
16 sentences in that paragraph, you set up a  
17 dichotomy. You say: "Statutory services could  
18 offer channels of particular musical genres, but  
19 the programming can be selected by the service."

20 And that's -- that's on -- those kind  
21 of services get the most statutory rate, right?

22 A. Right.

23 Q. And if listeners wanted to select  
24 their programming, they would have to pay for it  
25 through a directly-licensed service. So that is

1 the higher direct license rate, right?

2 A. Right.

3 Q. Okay. And that's the intent of the  
4 law as you understand it, correct?

5 A. Yes.

6 Q. Could you flip back one page in your  
7 written direct to Page 14, please?

8 This is the last full paragraph.

9 You're talking about advertising and -- I'm  
10 sorry. It's the paragraph above -- paragraph  
11 that starts "we found."

12 You say: "While there has been some  
13 growth in recent years in the advertising on  
14 streaming services, neither of the amounts that  
15 advertisers pay nor the average time that  
16 services run advertisements are on par with the  
17 corresponding dollar amounts and number of ads  
18 per hour on Terrestrial radio."

19 Do you see that testimony?

20 A. I do, yes.

21 Q. And I assume that your testimony on  
22 that point is based on your experience in the  
23 business, right?

24 A. And publicly-available information on  
25 the subject.

1 Q. Okay. So let's focus on the first  
2 part of that, the amounts that advertisers pay.  
3 Your testimony is that the amounts advertisers  
4 are willing to pay is less Webcasting than it is  
5 on Terrestrial radio, correct?

6 A. No, I don't believe that's what my  
7 testimony is focused on. It's focused on the  
8 amount of advertisements that are run per hour.

9 Q. Well, no. There's two parts of this  
10 statement, right? It says: "Neither the  
11 amounts that the advertisers pay nor the average  
12 time that servicers run advertisements." Okay?

13 So I'm going to focus on the first  
14 part of that statement.

15 A. Right.

16 Q. Okay. So neither the amounts that  
17 advertisers pay. So the typical measure of what  
18 advertisers are willing to pay is CPM, right?

19 A. Yeah, that's an element of measure,  
20 yes.

21 Q. Okay. And what does that stand for?  
22 Is it cost per thousand impressions, right?

23 A. Yes.

24 Q. And CPMs are significantly lower on  
25 Webcasting than they are on terrestrial radio,

1 correct? Is that your understanding?

2 A. I don't know about significantly, but  
3 I believe they're lower, yes.

4 Q. And you believe that it's because  
5 advertising budgets haven't yet started to  
6 support Webcasting the way they support  
7 terrestrial radio, correct?

8 A. That may be part of the reason.

9 Q. And that -- that's your  
10 understanding, right?

11 A. That may be part of the reason.

12 Q. So, now, let's go to the second part  
13 of that statement, the lower -- sort of the  
14 lower inventory aspect of it. That part is not  
15 applicable to simulcast, right? So we're  
16 focusing here on the average time that services  
17 run ads or are willing to run ads. And you say  
18 that it is lower for statutory services than it  
19 is for Terrestrial radio, right?

20 A. Right.

21 Q. Okay. So, at that point, it's not  
22 applicable to Terrestrial radio, right -- excuse  
23 me -- to simulcasting because the ad breaks are  
24 already -- are there built in, right? So if  
25 they can be sold on simulcast, presumably, they

1 will be sold, right?

2 A. I assume that they would be sold if  
3 they could, yes.

4 Q. You calculate in the paragraph just  
5 below that -- you calculate an ARPU for  
6 advertising for Pandora of 642 annually.

7 Do you see that?

8 A. Yes.

9 Q. So that's \$0.53 a month?

10 A. Right.

11 Q. And it wouldn't surprise you if the  
12 ARPU for simulcasters was even less than that,  
13 correct?

14 A. It is possible.

15 Q. Well, did you testify at your  
16 deposition that that wouldn't surprise you if  
17 that were true?

18 A. I may have, yes.

19 Q. And you've read your deposition  
20 recently, haven't you?

21 A. Uh-huh.

22 CHIEF JUDGE BARNETT: I'm sorry. Mr.  
23 Kooker, could you answer "yes" or "no" to the  
24 question?

25 THE WITNESS: Yes. Sorry.



1 BY MR. STURM:

2 Q. So you don't have any specific data  
3 on that point from simulcasting, correct?

4 A. No, I don't.

5 Q. Now, I take it that your position is  
6 that streaming has, to some extent, taken away  
7 digital sales. Is that fair to say?  
8 Cannibalizing?

9 A. I think streaming is having an impact  
10 on digital sales, yes.

11 Q. Would you say that streaming is  
12 cannibalizing digital sales?

13 A. I would say streaming is having a  
14 substitutional effect. Again, we're going  
15 through a transition.

16 Q. Do you not agree with that term  
17 "cannibalizing"? You don't use that one?

18 A. No, I don't use it because it usually  
19 -- people try to make a direct correlation with  
20 cannibalization and saying that one service is  
21 harming another service, and I don't think it's  
22 that straightforward.

23 Q. And you don't have any evidence to  
24 support that kind of cannibalization, correct?

25 A. What kind of cannibalization?

1 Q. What you just spoke about, that one  
2 service is harming another?

3 A. Yeah. No, we do have evidence of  
4 that.

5 Q. You spoke at the MIDEM conference in  
6 September 2012, right?

7 A. I did, yes.

8 Q. Okay. That's an industry music  
9 conference?

10 A. It is, yes.

11 Q. Could you get the other binder --

12 A. Sure.

13 Q. -- and look at Exhibit 4176? NAB  
14 4176.

15 A. Yes.

16 Q. And you have seen this article  
17 before, haven't you?

18 A. I have, yes.

19 Q. And that's your picture there?

20 A. That is my picture.

21 Q. All right. And you're quoted as  
22 saying in the second paragraph, beginning in the  
23 second paragraph: "We are constantly watching  
24 our business very closely and looking how  
25 different channels are affecting and impacting

1 each other. At this point, we don't see any  
2 evidence that any one area is significantly  
3 cannibalistic to another. Is there  
4 substitution? There is always going to be some  
5 as people move around and have choice. At this  
6 point, there is no evidence that any one model  
7 is seriously damaging any other model."

8 Is that the statement that you made  
9 at that conference?

10 A. That's the statement I made to a  
11 question that was asking about subscription  
12 streaming services.

13 MR. STURM: I move the admission of  
14 Exhibit 4176.

15 MR. KLAUS: No objection.

16 CHIEF JUDGE BARNETT: 4176 is  
17 admitted.

18 (NAB Exhibit 4176 was admitted into  
19 evidence.)

20 BY MR. STURM:

21 Q. And at the time you made this  
22 statement in 2012, Pandora and SiriusXM and  
23 simulcasting were all Webcasting at that time,  
24 right?

25 A. They were, but that wasn't what the

1 question was asked and my response to that  
2 question.

3 MR. STURM: Thank you, Your Honor.

4 No further questions.

5 CHIEF JUDGE BARNETT: Thank you.

6 Before we go further, let's take our  
7 morning recess. Fifteen minutes.

8 (A short recess was taken.)

9 CHIEF JUDGE BARNETT: Mr. Larson.

10 MR. LARSON: Thank you, Your Honor.

11 CROSS-EXAMINATION BY COUNSEL FOR

12 PANDORA MEDIA, INC.

13 BY MR. LARSON:

14 Q. Mr. Kooker, good morning.

15 A. Good morning.

16 Q. I'm Todd Larson here representing  
17 Pandora Media.

18 Do you recall that I was at your  
19 deposition?

20 A. I do, yes.

21 Q. I'd like to turn to Page 19 and 20 of  
22 your written testimony, if you could. And I'll  
23 tell you, if it's easier, it is in the smaller  
24 book. There's a tab called SX12?

25 A. This one.

1 Q. You describe on 19 and 20 what you  
2 call the substitutional impact of streaming,  
3 correct?

4 A. Yes.

5 Q. And you include a chart that --  
6 showing that download sales for top tracks were  
7 less in 2014 than in 2013; is that correct?

8 A. Yes.

9 Q. But you have presented no evidence  
10 that statutory Webcasting is the cause of the  
11 declining sales data in Figure 20, correct?

12 A. Correct.

13 Q. Let me ask you to turn in your binder  
14 to Pan Exhibit 57.

15 A. Yes.

16 Q. And I'll represent that this was  
17 produced in discovery in this case. And I  
18 believe Mr. Pomerantz used a portion of this in  
19 his opening.

20 Do you recognize this document?

21 A. I do recognize it, yes.

22 MR. KLAUS: And, Your Honor, I'm  
23 sorry. I don't mean to interrupt Mr. Larson.

24 But we are in open session still, I  
25 believe. And the document was designated

1 restricted. I just want to make sure you're  
2 aware of that.

3 MR. LARSON: I -- and my recollection  
4 is that the page that I'm going to talk about  
5 was showed in the open session.

6 MR. POMERANTZ: I don't know which --  
7 I believe I gave it in a notebook to the judges,  
8 but I did not directly refer to it.

9 MR. KLAUS: That's correct.

10 MR. LARSON: Okay. I'll hold that,  
11 and then we'll have a restricted session, and  
12 I'll deal with that document. Thank you.

13 BY MR. LARSON:

14 Q. Let me direct you to Page 8 of your  
15 testimony Mr. Kooker. And in the bottom two  
16 paragraphs of the page, I'll just read a couple  
17 of sentences.

18 You say: "While revenue from  
19 physical product has been shrinking, revenue  
20 from digital product has increased but nowhere  
21 near a level sufficient to close the gap caused  
22 by plummeting physical sales."

23 Do you see that?

24 A. I do, yes.

25 Q. And then in the following paragraph,

1 looking at the first sentence, again you mention  
2 the gap between declining physical sales,  
3 correct?

4 A. Yes.

5 Q. Is it your view that it's the  
6 responsibility of statutory Webcasters such as  
7 Pandora to close the gap caused by plummeting  
8 physical sales?

9 A. I don't know that it's their  
10 responsibility to close the gap, but they are an  
11 important part of the overall revenue ecosystem  
12 of the business.

13 Q. But you're not suggesting it should  
14 be on their shoulders to close the gap?

15 A. Not solely, no.

16 Q. And you observed on Page 14 that  
17 Pandora's ad load is less than terrestrial  
18 radio; is that right?

19 A. Correct.

20 Q. And do you mean that as a criticism  
21 that Pandora should be selling more ads than it  
22 is?

23 A. Well, I mean it as a statement of  
24 fact, that -- that they do sell fewer ads than  
25 terrestrial radio.

1 Q. And do you mean to suggest by that  
2 though that they should sell more?

3 A. In an ideal world, yes, they would  
4 sell more.

5 Q. But are you saying they should sell  
6 more?

7 A. I'm saying that it would be preferred  
8 if they sold more.

9 Q. Have you presented any evidence in  
10 your testimony that Pandora could sell more ads  
11 if it wanted to?

12 A. I have not provided that evidence,  
13 no.

14 Q. And do you have any evidence as to  
15 what would happen to Pandora's user base if it  
16 ran as many ads as terrestrial radio?

17 A. I assume that it would have an impact  
18 on their user base.

19 Q. And that impact would be negative,  
20 correct?

21 A. Yes.

22 Q. Have you presented any evidence that,  
23 if Pandora chose to run more ads per hour, it  
24 would cause users to chose to subscribe to the  
25 ad-free version of Pandora instead?



1 A. No. We've not done that research.

2 Q. Now, on Page 14, which is where you  
3 discuss ad load, you also note that Pandora's  
4 subscription revenues are too low, correct?

5 And I'll direct you to the bottom  
6 paragraph if that's helpful.

7 A. Yes.

8 Q. All right. Have you presented any  
9 evidence in your testimony of what would happen  
10 to Pandora's subscriber levels if it were to  
11 raise its subscription fee?

12 A. No, I did not.

13 Q. Have you provided any evidence in  
14 your testimony that there is a meaningful group  
15 of users who are willing to pay to subscribe to  
16 Pandora above and beyond those who currently  
17 subscribe?

18 A. No. No evidence in my testimony  
19 specific to Pandora.

20 Q. Now, you indicated in your direct  
21 testimony that, if Sony's revenue didn't cover  
22 costs, you'd invest less in your business and  
23 have to control costs; is that right?

24 A. Correct.

25 Q. And it's true, is it not, that, if

1 your revenues stayed the same but your costs  
2 went up, you'd also have to control costs and  
3 have less to invest in the business?

4 A. Controlling cost is a key element to  
5 running a business, yes.

6 Q. Your testimony discusses in various  
7 places the concepts of ARPU, correct?

8 A. Yes, it does.

9 Q. That's average revenue per user?

10 A. Average revenue per user, yes.

11 Q. And Sony takes a share in some form  
12 of that average-revenue-per-user earnings by the  
13 various services with whom you have licenses?

14 A. Yes. On the subscription side of the  
15 business, yes.

16 Q. And what is your -- Sony's ARPU from  
17 terrestrial radio?

18 A. Sony's ARPU from terrestrial radio is  
19 zero.

20 Q. And what is Sony's ARPU from pirated  
21 music services?

22 A. The same. Zero.

23 Q. You mentioned that you have a team  
24 that works with the top 20 digital providers; is  
25 that right?

1 A. Yes, I did.

2 Q. How many of those people are assigned  
3 to the Pandora account?

4 A. None.

5 Q. All right. Do you have a view,  
6 sitting here, of how much of Sony's revenue is  
7 represented by Pandora royalties?

8 A. Honestly, not off the top of my head.

9 Q. About 10 percent, do you think? Does  
10 that sound about right?

11 A. Honesty, I don't know off the top of  
12 my head.

13 Q. Let me direct you to Page 15 of your  
14 testimony.

15 Now, you say here in heading B that  
16 statutory services compete head to head with  
17 interactive services, correct?

18 A. Yes.

19 Q. And then this section generally  
20 discusses your claim that statutory and  
21 interactive service are conversion; is that  
22 right?

23 A. Yes.

24 Q. Let's look over at Page 16, the  
25 paragraph that starts with "Customized radio."

1 Do you see that?

2 A. I do, yes.

3 Q. And then in that paragraph you  
4 identify certain ways that you suggest this  
5 services -- those two categories of service are  
6 conversion; is that right?

7 A. Yes.

8 Q. Both types of services are available  
9 on mobile phones, right?

10 A. Yes.

11 Q. Does being on a mobile phone allow a  
12 Pandora user to select and listen to a  
13 particular song on demand?

14 A. No, it doesn't.

15 Q. That functionality is something that  
16 a Spotify subscriber can use, correct?

17 A. Spotify paid subscriber, yes.

18 Q. You say users of both services, both  
19 interactive and on-demand services, can share a  
20 playlist on social media, correct?

21 A. Yes.

22 Q. And so an example of that would be  
23 that a Pandora user can share one of his or her  
24 stations with their Facebook friends?

25 A. Yes.

1           Q.       So if I share my Pandora station or  
2 one of my Pandora stations with my Facebook  
3 friends, does that allow me or any of my friends  
4 to select and listen to a particular song on  
5 demand?

6           A.       No, it doesn't.

7           Q.       That's something I could do on  
8 Rhapsody or Spotify, correct?

9           A.       On the paid tier.

10          Q.       You say in the same paragraph that  
11 both interactive and on-demand services make  
12 recommendations of songs or stations for the  
13 user to listen to.

14                   Do you see that?

15          A.       Yes.

16          Q.       Just to be clear, a statutory  
17 Webcaster cannot recommend a song and allow the  
18 user to listen to that song on demand, correct?

19          A.       Correct.

20          Q.       And recommending a station to a user  
21 on a noninteractive does not allow the user to  
22 select and listen to a particular song on  
23 demand, correct?

24          A.       Correct.

25          Q.       You suggest that both noninteractive

1 and interactive services offer curated  
2 playlists?

3 A. Yes.

4 Q. If a statutory Webcaster offers a  
5 curated playlist, does that allow the user to  
6 select and listen to a particular song on  
7 demand?

8 A. No, it doesn't.

9 Q. An on-demand service offering a  
10 curated playlist, the user can see every track  
11 on that playlist in advance, correct?

12 A. Yes, they can.

13 Q. Again, just returning to confirm to  
14 the heading in paragraph B on Page 15, you say  
15 Webcasters compete head to head with on-demand  
16 services.

17 A. Yes.

18 Q. You've presented no empirical  
19 evidence in your testimony that statutory  
20 Webcasting acts as a substitute for on-demand  
21 services like Spotify?

22 A. No known empirical evidence.

23 Q. And you've presented no evidence your  
24 testimony of consumers' willingness to pay for  
25 on-demand services, correct?

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1           A.           No.

2           Q.           And no evidence as to how many  
3 consumers are willing to actually pay the \$10  
4 price that's currently charged by on-demand  
5 services?

6           A.           Not in my testimony, no.

7                       MR. LARSON: I think at this point,  
8 Your Honor, I'm moving to the restricted  
9 material.

10                      CHIEF JUDGE BARNETT: Okay. Ladies  
11 and gentlemen, you know the drill.

12 (THIS ENDS PUBLIC SESSION)

13 (RESTRICTED SESSION BOUND SEPARATELY)

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1 (THIS BEGINS PUBLIC SESSION)

2 CHIEF JUDGE BARNETT: Please be  
3 seated.

4 Before you sit, sir, please raise  
5 your right hand.

6 DARIUS VAN ARMAN,  
7 being first duly sworn, to tell the truth, the  
8 whole truth and nothing but the truth, testified  
9 as follows:

10 MR. POMERANTZ: Your Honor, before we  
11 begin with Mr. Van Arman, I just want to  
12 introduce -- I think the last two members of our  
13 team, Mr. Kuruvilla Olasa and Rachel June  
14 Draper.

15 CHIEF JUDGE BARNETT: Thank you.  
16 Welcome.

17 MR. RICH: And, in turn, Your Honor,  
18 on our team, Mr. Yolkut, to my left, will be  
19 doing the cross-examination of this witness.

20 CHIEF JUDGE BARNETT: Okay. Thank  
21 you.

22 And before we begin, if you could  
23 state your name for the record, spelling first  
24 and last time.

25 THE WITNESS: My name is Darius Van



1 Arman. My first name is spelled D-A-R-I-U-S.

2 My last name is spelled V-A-N-A-R-M-A-N.

3 CHIEF JUDGE BARNETT: Thank you.

4 MR. POMERANTZ: Your Honor, may I  
5 approach to hand out the books for this witness?

6 CHIEF JUDGE BARNETT: Sure.

7 MR. POMERANTZ: Very thin.

8 DIRECT EXAMINATION BY COUNSEL FOR SOUNDEXCHANGE

9 BY MR. CHOUDHURY:

10 Q. Good afternoon, Mr. Van Arman.

11 What do you do for a living?

12 A. So I am one of the owners and founder  
13 of Secretly Group, which is a group of  
14 independent labels based out of Indiana and --  
15 with offices, as well, in New York and in  
16 London. And the labels that comprise Secretly  
17 Group are Dead Oceans, Jagjaguwar, Secretly  
18 Canadian, and The Numero Group. We also have  
19 affiliated companies that have some common  
20 ownership, SC Distribution, which is a  
21 distributor; Fort William Artist Management, and  
22 Secretly Canadian Publishing.

23 Q. And what are your responsibilities at  
24 Secretly Group?

25 A. So, you know, typical of many

1 independent labels, my responsibilities are not  
2 only dealing with the macro planning of our  
3 business, but I'm also involved in a lot of the  
4 project management and artist development. Some  
5 specific roles I have is I handle our business  
6 affairs and our information technology efforts.

7 Q. And how long have you worked in the  
8 music industry?

9 A. Since 1996.

10 Q. So, what did you do when you first  
11 got involved in the music industry?

12 A. So -- you know, at the very, very  
13 beginning of when I got involved I was actually  
14 in school at the University of Virginia and  
15 taking classes, but also working many different  
16 jobs on top of it. And one job that I, you  
17 know, had when I was at -- in Charlottesville at  
18 the University of Virginia was I did overnights  
19 at a home for assisted living for mentally  
20 handicapped adults. And how I got in the music  
21 industry was -- well, I was doing an overnight  
22 and a blizzard happened in '95 or '96 in  
23 Charlottesville, which isn't typical for  
24 Charlottesville. And I was stuck at this home  
25 for many days, and I got a lot of overtime.

1 And, at the time, my housemate was in a band,  
2 had recorded a record and couldn't find a label.  
3 So using this, you know, found money, I helped  
4 him put out his first record.

5 Q. And that was the first Secretly  
6 Canadian record?

7 A. No. The first Jagjaguwar record. So  
8 I founded Jagjaguwar in Charlottesville, you  
9 know. Then, you know, started slowly to find  
10 other artists that were near Charlottesville and  
11 in Virginia and also helped book a tour for this  
12 first band that was on Jagjaguwar called The  
13 Curious Digits. And in booking the tour, I  
14 wasn't a booking agent. It was a horribly  
15 routed tour, you know. The average drives of  
16 ten hours between, you know, each show, and the  
17 shows were in Bloomington, Indiana, and  
18 Rochester, New York, Arlington, Virginia, and a  
19 city in West Virginia.

20 And when this first artist of ours,  
21 Jagjaguwar, was in Bloomington, they stayed at  
22 just someone who had offered at a show to put  
23 them up who eventually became my partner, Chris  
24 Swanson, who, with his partners, had started  
25 Secretly Canadian at the same time in

1   Bloomington, Indiana. And we started to become,  
2   you know, phone pals, and, you know, few years  
3   later he said, hey, you know, want to be  
4   partners? And I said, yes. And he says, well,  
5   you have to move to Bloomington. And so I moved  
6   to Bloomington, Indiana in 1999.

7           Q.       So, Mr. Van Arman, can you explain to  
8   the judges how the Secretly Canadian -- Secretly  
9   Group of today compares to that Jagjaguwar of  
10  1996?

11          A.       So, in 1996, it was just myself, you  
12  know, releasing records out of my bedroom. In  
13  '99, when I moved to Bloomington, Indiana, it  
14  was just four of us, initially, sharing an  
15  office and one computer, one fax line, and one  
16  e-mail account. Now we're approximately 70  
17  employees between all the labels and the  
18  affiliated companies and we have offices in  
19  Bloomington, Indiana, New York City, London,  
20  Austin, and Chicago.

21          Q.       And about how many artists do you  
22  work with now?

23          A.       We currently work with about 60  
24  active artists between the three labels; Dead  
25  Oceans, Jagjaguwar, and Secretly Canadian. And

1 many more are reissued on Numero Group which  
2 focused on works in the past.

3 Q. How many sound recordings does the  
4 Secretly Group release each year?

5 A. If I had to estimate between those  
6 four labels, many hundreds, probably approaching  
7 a thousand copyrights a year.

8 Q. Besides your work at Secretly Group,  
9 are you, otherwise, involved in the music  
10 industry?

11 A. Yes.

12 Recently, I have become involved in  
13 some bodies -- you know, organizational bodies  
14 that have -- that represent independent  
15 interests. For example, I am a board member of  
16 Merlin, a non-voting observer of the Merlin  
17 board. I am a founding council member of the  
18 Worldwide Independent Network, which is an  
19 umbrella organization that, you know, networks  
20 all the different independent label trade  
21 organizations in each country. I used to be and  
22 am currently running again to be on the board of  
23 A2IM, which was -- which is a -- the American  
24 Independent Label Trade Organization, sort of  
25 the independent counterpart to the RIAA here in

1 the United States of America. And I have, you  
2 know -- I'm also on the board of SoundExchange.  
3 Recently, about three years ago, I became the  
4 independent seat or one of the independent seats  
5 representing the independent perspective on the  
6 SoundExchange board.

7 Q. So in all of these boards, do you  
8 ever encounter other independent record  
9 companies?

10 A. Yes, quite frequently.

11 Q. And do you talk with them about their  
12 business?

13 A. Yes.

14 Q. And let me ask you: I think you  
15 mentioned earlier that Secretly Group also has a  
16 distribution company; is that right?

17 A. Yes.

18 So we have -- one of the affiliated  
19 companies to Secretly Group is SC Distribution,  
20 which is an international distributor. SC  
21 Distribution distributes not only the four  
22 Secretly Group labels that I have a -- you know,  
23 an ownership stake in, but also, you know,  
24 approximately 40 to 45 other labels that I have  
25 no ownership stake in at all. We're -- you

1 know, when talking about SC Distribution, it's  
2 a -- it's an independent distributor that is  
3 competing with other independent distributors  
4 and the major distribution arms.

5 Q. So when you're distributing the other  
6 independent record labels, are you privy to  
7 information about their businesses?

8 A. Yes.

9 Q. And do you communicate with them  
10 about their sound recordings?

11 A. Yes.

12 Q. And when you say that you distribute  
13 them what do you mean by that?

14 A. So a distributor, you know -- a  
15 distributor enters into agreements with rights  
16 holders, whether it's a label or an artist and  
17 says, you know, hey, we will, you know,  
18 distribute your recordings whether they're in  
19 physical form or digitally throughout the world.  
20 We're going to send your product, you know,  
21 through our distribution network. We're going  
22 to enter into digital service agreements with  
23 your content. We're going to collect all the  
24 revenue that stems from the sales or the  
25 exploitation of your copyrights and then we're

1 going to pay that to you, but we're going to  
2 take a distribution cut for doing the  
3 distribution work.

4 Q. So in Secretly Group negotiates with  
5 digital services, are you involved in those  
6 negotiations?

7 A. Yes.

8 Q. And, you know, are you -- okay. Are  
9 you involved in those locations -- are you also  
10 involved in the actual negotiations talking with  
11 the digital services?

12 A. Sometimes. So, you know, our  
13 businesses, we have a small business affairs  
14 team. So much of the time our general counsel  
15 is having those conversations. We sometimes  
16 also rely on collective licensing where we're  
17 not part of the negotiations, but we can review  
18 a fully negotiated deal and decide whether to  
19 opt in or opt out of it. In the past, we have  
20 relied on the agreements of a major, that they  
21 have negotiated when we were distributed  
22 digitally by a major recording company.

23 Q. So let's go through that. So  
24 Secretly Group sometimes negotiates directly  
25 with the digital music service, right? That's



1 one way you distribute?

2 A. Yes.

3 Q. You reference collective licensing.

4 What is that?

5 A. So collective licensing, one of the  
6 organization that I am an observer on called  
7 Merlin, that's an example of an agency that  
8 collectively negotiates on behalf of its  
9 membership, and Merlin's membership are  
10 independent labels and independent distributors.  
11 And so when something is collectively  
12 negotiated, an agency such as Merlin goes to a  
13 digital service and tries to work out what  
14 Merlin thinks is a commercially reasonable  
15 agreement with that service. And after  
16 negotiating with the service and coming to some  
17 agreement, approaches its membership and says,  
18 hey, we collectively negotiated this on behalf  
19 of our membership, would you like to opt in or  
20 opt out of this agreement?

21 Q. Mr. Van Arman, why would an  
22 independent record company like the Secretly  
23 Group label, why would they want to work for  
24 Merlin?

25 A. So, you know, even though we're one

1 of the larger independent companies, labeled  
2 groups in the United States, we often have a  
3 difficulty getting access to a negotiation.  
4 Some digital services won't really negotiate  
5 with us. They will provide us  
6 take-it-or-leave-it deals often at the eleventh  
7 hour. And so even for a company our size, we  
8 have seen that when a license is collectively  
9 negotiated, the terms that are offered to us  
10 that we can opt into are more favorable than  
11 what we can achieve on our own.

12 Q. And I believe you mentioned that you  
13 were, at one point, digitally distributed  
14 through a major; is that right?

15 A. Correct.

16 Q. What major was that?

17 A. Warner Music Group.

18 Q. And why would you license your sound  
19 recordings through a major?

20 A. Well, at the time when we were a  
21 smaller company we didn't really have an option.  
22 We needed some help with distribution, physical  
23 distribution, and part of our distribution  
24 agreement with Warner Music Group was that they  
25 required our digital distribution.

1 I talk about this a little bit in my  
2 testimony. It was only for a few more labels  
3 that I had an ownership stake in that Warner  
4 Music Group digitally distributed; but, at the  
5 same time, for all the other labels that were  
6 distributed, we developed the ability, the  
7 capability to distribute and enter into digital  
8 service agreements on behalf of those labels.  
9 And so, you know, at some point recently, it was  
10 at the end of 2013, beginning of 2014, we were  
11 in a position with our relationship with Warner  
12 Music Group, they continued to distribute us  
13 physically but we were able to start digitally  
14 distributing our content directly.

15 Q. And when you're distributing through  
16 a major, how does that relationship work? What  
17 do they do for you? What do you do for them?

18 A. So when a major distributes our  
19 labels or any labels, it's the same thing as  
20 what SC Distribution does. They receive your  
21 physical product. They send it out into the  
22 marketplace. They digitally distribute your  
23 content. They collect from the revenue that's  
24 generated from the sales of the physical stock  
25 or the digital copies of your records or from

1 digital streaming. They report that revenue  
2 back to you and then they take a cut before  
3 they, you know, pay all that revenue to you.

4 Q. So we have talked about distributing  
5 through SC Distribution, and collective  
6 licensing through Merlin, and distributing  
7 through a major.

8 Are you aware of any other ways that  
9 independent record companies distribute their  
10 recordings to digital music services?

11 A. Well, you know, you said, you know,  
12 distribute through a major through a company  
13 like SC Distribution. Some -- and maybe you  
14 said this, but I didn't hear this, Anjan. Some  
15 -- you know, some labels and artists distribute  
16 directly. You know, they will try to build up  
17 their own direct-to-consumer sales network.  
18 They might engage in negotiations directly with  
19 digital services and they don't rely on  
20 distributors or licensed bodies like Merlin to  
21 negotiate deals on their behalf.

22 Q. I'm going to ask you to look at Tab 1  
23 of the black binder in front of you. Look at  
24 what has been marked as SoundExchange Trial  
25 Exhibit 0020.

1 Do you recognize this document?

2 A. I apologize. Which document again?

3 Q. Behind Tab 1.

4 A. Okay.

5 Yes, I do recognize this document.

6 Q. What is that document?

7 A. This is my testimony that I put forth  
8 to the copyright royalty judges in the fall for  
9 this rate proceeding.

10 Q. And did you prepare this testimony?

11 A. Yes, I did.

12 Q. Okay. If you could turn to the last  
13 page of that exhibit, is that your signature?

14 A. Yes.

15 Q. Is the information in your written  
16 testimony true and correct?

17 A. Yes.

18 MR. CHOUDHURY: At this time, I would  
19 move for admission of SoundExchange Trial  
20 Exhibit 0020.

21 MS. VOLKMAR: Good afternoon, Your  
22 Honor.

23 My name is Jillian Volkmar and I  
24 represent the National Association of  
25 Broadcasters, and we have a couple of objections

1 to the admission of Mr. Van Arman's written  
2 direct testimony.

3 CHIEF JUDGE BARNETT: Can you state  
4 them?

5 MS. VOLKMAR: Sure.

6 So we object to Page 12, Paragraph 2,  
7 which starts with "While I do not know the terms  
8 of the major record company licenses with Apple  
9 for its iTunes radio services, I suspect this is  
10 essentially what happens." And we object to  
11 that whole paragraph for a lack of foundation  
12 and speculation.

13 CHIEF JUDGE BARNETT: Okay. And  
14 other objections?

15 MS. VOLKMAR: If you turn to the next  
16 page starting with the first paragraph, first  
17 sentence: "Indeed, with respect to other  
18 digital services, I have even heard discussion  
19 of a negative Most Favored Nations," that whole  
20 sentence for a lack of foundation and hearsay.

21 CHIEF JUDGE BARNETT: Others?

22 MS. VOLKMAR: That's it.

23 CHIEF JUDGE BARNETT: Thank you.

24 Do you want to respond?

25 MR. CHOUDHURY: Yes, Your Honor.

1 First, as a sort of threshold matter,  
2 we believe that your April 9th order made clear  
3 that any objections, outside of relevance, to  
4 the admissibility of exhibits had to be stated  
5 in the April 20th filings of the parties. This  
6 written testimony and all of our written  
7 testimony were exhibits. And, as you know, we,  
8 of course, objected to the exhibits on the other  
9 side. So we believe that these objections have  
10 been waived.

11 In addition, I'm happy to respond to  
12 the merits of either of the two objections.

13 MS. VOLKMAR: Given the clear CRB  
14 regulations and consistent practice, we did not  
15 understand and none of our co-services  
16 understood the April 9th order, which  
17 self-distinguished between testimony and  
18 exhibits to require objections to testimony,  
19 which we believe that CRB regulations at 37  
20 C.F.R., Section 351, support our position that a  
21 participant can object to testimony as it is  
22 being offered during the course of the hearing.

23 MR. FAKLER: Excuse me, Your Honor?

24 CHIEF JUDGE BARNETT: Mr. Fakler?

25 MR. FAKLER: May I add something

1 briefly?

2 CHIEF JUDGE BARNETT: You may.

3 MR. FAKLER: Thank you, Your Honor.

4 I would also just in supplement to  
5 that note that both the regulations of the  
6 Copyright Royalty Judges 351.4 and also the  
7 statute, itself, in Section 803(b)(6)(C)(ii)(II)  
8 does very clearly differentiate between  
9 testimony -- when it's discussing the written  
10 direct statement of the parties, for example, in  
11 both of those places differentiates between the  
12 testimony and the exhibits, both of which -- both  
13 of which must be included within the written  
14 regs.

15 Thank you.

16 CHIEF JUDGE BARNETT: Thank you.

17 MR. CHOUDHURY: And just briefly, of  
18 course Your Honor knows what you all intended in  
19 the April 9th order. But let me just add that,  
20 as you well know, that when we filed objection  
21 to the exhibits, including the written direct  
22 testimony listed as exhibits, the services  
23 responded by saying that our objections at that  
24 time were untimely. They responded by saying  
25 they were out of time, motion to strike. And



1 that was on April 20th.

2 We received these objections after  
3 midnight last night. And if there was a case  
4 for waiver, I think this is -- this is a pretty  
5 good case for waiver because the thought that  
6 the judges made a very clear order that said  
7 that what is on the exhibit list should be --  
8 that the objection should be filed by that date  
9 except with respect to relevance, and that's not  
10 the objections we're talking about here. The  
11 services saw what SoundExchange did in response.  
12 They saw that they noticed this written  
13 testimony as exhibits at the time, and they, in  
14 fact, admitted their own -- at least two of the  
15 services, they made their own statement that  
16 even SoundExchange's exhibits -- objections at  
17 that time were out of time or waived.

18 CHIEF JUDGE BARNETT: The objection  
19 is overruled. We will admit Exhibit 20, but we  
20 certainly understand and can recognize  
21 speculative testimony, hearsay testimony,  
22 testimony not based on personal knowledge, and  
23 we can weigh the testimony accordingly.

24 MR. CHOUDHURY: Thank you, Your  
25 Honor.

1 (SoundExchange Exhibit 0020 was  
2 admitted into evidence.)

3 BY MR. CHOUDHURY:

4 Q. So, Mr. Van Arman, you know, the  
5 judges are aware that I am a big fan of Katy  
6 Perry, but I am also a big fan of indie labels.

7 Can you tell us about some of the  
8 artists that are signed at Secretly Group?

9 A. For sure.

10 So our best selling artist is Bon  
11 Iver, who worldwide we sold more than a million  
12 records and they have gone gold. And two of  
13 those records have gone gold, and he's won  
14 multiple Grammy awards. Recently, winning at  
15 best new artist, which is one of the major  
16 Grammy awards.

17 We also released recordings by a  
18 comedian named Tig Notaro, who was nominated  
19 recently for best comedy album. And, you know,  
20 her record, when it came out that year, was the  
21 best selling comedy record in the world.

22 We also work with other artists that  
23 are renowned and critically renowned, Dinosaur  
24 Jr., who's an artist that's been around since  
25 1994 creating, you know, what we think is a very

1 vital important music. We also are about to  
2 reissue the recordings of Yoko Ono. Some of her  
3 classic records we're going to be bringing back  
4 at the marketplace and repackaging them and  
5 reintroducing them.

6 Q. And can you clarify -- you know, can  
7 you elaborate for the judges what does The  
8 Numero Group do?

9 A. The Numero Group focuses -- sort of  
10 reissues and going back in time and finding  
11 artists and recordings that maybe didn't receive  
12 the attention they deserved when they came out  
13 originally. And one example of a Numero Group  
14 compendium or compilation is Purple Snow, the  
15 Minneapolis Sound, which is a compilation of,  
16 you know, obscure, soul, and R&B artists from  
17 Minneapolis just prior to Prince becoming  
18 renowned for what he has contributed to our  
19 musical landscape.

20 And so they really focus on finding  
21 work that the public really haven't, you know,  
22 spent a lot of time in, reconceptualizing them,  
23 doing these exquisite liner notes and getting it  
24 back out there for the public to get another  
25 opportunity to learn about these artists and

1 their recordings.

2 Q. And how does Secretly Group find  
3 their artists?

4 A. Many different ways. You know, we  
5 used to listen to every demo that came to our  
6 companies and that, you know, it was a big  
7 investment of time. We also get referrals from  
8 the artists we work with. They say, hey, you  
9 know, I went on tour and I played with this band  
10 in Boston and I think you should check them out,  
11 and they would put us in touch with artists that  
12 they actually played with or knew, and so we  
13 often discover artists from referrals.

14 We often get approached by managers  
15 and lawyers who we work with already who say,  
16 hey, we -- we're now representing another artist  
17 that you should check out. We spent a lot of  
18 time attending shows, at showcases where our  
19 staff and myself were avid music fans. So we're  
20 always listening to what's out there in the  
21 marketplace, and so sometimes we also reach out  
22 to an artist and say, hey, we would like to get  
23 to know you and see if we can maybe work with  
24 you.

25 Q. Can you think of an example of one of

1 these artists you discovered in this way?

2 A. One artist that we recently became  
3 partners with is this artist name Angel Olsen.  
4 And we -- this is an artist that we sort of  
5 discovered in two different ways at the same  
6 time. My -- one of my colleagues, John Coons,  
7 who's a -- used to be a project manager and do  
8 A&R for us, he learned about her music from a  
9 compilation that his friend put out, another  
10 indie label in Chicago, and so she -- he heard  
11 Angel Olsen's recording and his ears were perked  
12 and he wanted to learn about more who she was  
13 and see if we could maybe work with her.

14 At the very same time, there was an  
15 artist that I worked with very early on, it was  
16 our second Jagjaguwar artist, a gentleman named  
17 Rick Alverson, who is now a movie director, and  
18 he was, you know, shooting a movie and putting  
19 together a trailer for that movie, and the  
20 soundtrack to that trailer that he shared with  
21 me over the Internet had Angel Olsen's voice on  
22 it. And I got this trailer from Rick and  
23 immediately I reached out to him and said, who  
24 is this amazing voice. She sounds like Patsy  
25 Cline, but Roy Orbison. This is a voice unlike,

1 you know, any voice I have heard.

2                   And, you know, from there, you know,  
3 he put me in touch with her. You both John and  
4 I attended numerous shows that she performed in  
5 New York City. I traveled to Chicago to sit  
6 down with her. And, you know, we had a  
7 conversation, it led to other conversations.  
8 But we got a sense of whether we could work well  
9 together. She learned about who we were. We  
10 had an opportunity to learn about what she  
11 wanted in a label, what kind of support she  
12 wanted, and then we decided to work together.

13           Q.       So let me ask you: -- you know, so  
14 Ms. Olsen is now signed to the Secretly Group.

15                   What do your record labels do to  
16 support her recordings?

17           A.       So we -- you know, first, one of the  
18 objective ways we help the artists that we have  
19 an opportunity to work with as we put together  
20 recording funds, that's part of the agreements  
21 we do with an artist, is we're going to fund  
22 your recordings. And so we help in that  
23 objective way, but part of that, too, is we have  
24 a lot of conversations about how are you going  
25 to record this record, and -- and we introduced

1 her to a producer name John Congleton, who we  
2 felt like did exceptional work. He recently won  
3 a Grammy. And they started communicating and  
4 they realized that they could work well together  
5 so they made the record.

6           Once we got the recording that they  
7 created, we spent a lot of time talking with her  
8 directly and her manager about how to introduce  
9 this to the market, how to have her music become  
10 discovered by fans all over the world. We  
11 orchestrated press trips. We had her travel to  
12 London, met her team there. We talked about  
13 what kinds of videos we wanted. We funded those  
14 videos, and we got a sense of exactly how she  
15 wanted to approach the marketplace. And we did  
16 our best to, you know, market the record and  
17 maximize the revenues we could earn from these  
18 recordings, while at the same time honoring her  
19 vision for how she wanted her music presented to  
20 the world.

21       Q.       And, in your experience, is that  
22 typical of how independent record companies  
23 support their artists?

24       A.       For many of the companies I know,  
25 yes, there's a -- you know, there's a -- the

1 independent community is a big community. But  
2 more so than a major regarding companies, I  
3 think independent labels have, you know, a  
4 direct connection to their artists, and there's  
5 more of a conversation about how the records are  
6 going to be marketed. And they devote a lot of  
7 time to really understanding, you know, the kind  
8 of language that's specifically used and in  
9 discussing these recordings and promoting the  
10 artists, and it's in partnership with the  
11 artist.

12 Q. So let me ask you: What is Secretly  
13 Group's business model?

14 A. If we try to make a profit on the  
15 majority of records we release -- you know, if  
16 we release between the labels in Secretly Group,  
17 40 releases a year, we want to -- our goal is to  
18 make a profit on the majority of those releases.

19 Q. And why that model?

20 A. We just feel it's sustainable. We  
21 feel -- you know, most of our agreements with  
22 artists are net profit deals. So if, you know,  
23 we are doing this in partnership with an artist,  
24 you know, they're not going to get any  
25 additional payment from us, in many cases,



1 unless we are profitable on one of their  
2 releases. And so for us, that's a  
3 responsibility that we take very seriously. And  
4 so, for us, it's not a workable business model  
5 to lose money on nine projects, but hit one out  
6 of the ballpark and have a blockbuster that  
7 keeps the lights on. We really want to have  
8 sustainable budgets and be profitable on -- the  
9 goal is on every release, but, obviously, that's  
10 not always possible. So it's -- we try to make  
11 sure we're profitable in the majority of our  
12 releases.

13 Q. And so how did digital revenues play  
14 into your business model?

15 A. Well, you know, early on, in 1996, we  
16 are largely physically focused. It was all  
17 about selling CDs and eventually -- also when we  
18 could afford it, it was about selling vinyl, as  
19 well.

20 Now, you know, a majority of our  
21 revenues is from digital distribution of our  
22 copyrights that we release in partnership with  
23 our artists. So, for us, digital revenues are a  
24 very critical part of the revenue that we depend  
25 on to keep our lights on and keep doing the good

1 work we're trying to do for ourselves and for  
2 our artists.

3 Q. And, Mr. Van Arman, you compared  
4 today to 1996, but what about over the last five  
5 years? How have digital revenues changed or not  
6 changed in your business model?

7 A. In the last five years, the digital  
8 revenues have become tripled and have become a  
9 majority of our revenue compared to physical.  
10 Right now, our digital revenues compared to our  
11 physical revenues represents, roughly, 65  
12 percent of the pie.

13 Q. And when you say, "digital revenue,"  
14 what are you including?

15 A. I'm including not only permanent  
16 downloads such as MP3s that one might purchase  
17 on the iTunes music store, but also the revenues  
18 that we receive from streaming services.

19 Q. And when you say, "streaming  
20 services," what do you mean?

21 A. So the streaming services, to name a  
22 few, is Spotify, Rdio, Rhapsody, you're talking  
23 the interactive streaming services where a  
24 consumer can choose exactly what they want to  
25 listen to on a track-by-track basis. And they

1 also include noninteractive services like  
2 iHeartRadio or Pandora or iTunes radio that  
3 don't give as much interactivity to the users.  
4 So those are some examples of streaming services  
5 who's revenue we rely on.

6 Q. Now, in your testimony, Mr. Van  
7 Arman, you refer to a concept called "breakage."  
8 Can you explain what you mean by that  
9 term?

10 A. Yes.  
11 When we're negotiating an agreement  
12 with a digital service or distributor that we  
13 rely on in the -- like when we worked with  
14 Warner Music Group or Merlin, when they  
15 negotiate a deal that we opt into, one aspect of  
16 an agreement is the headline royalty rate.  
17 It's, you know, basically what is offered as  
18 what you will receive in revenue for each stream  
19 that occurs.

20 Sometimes in digital streaming deals,  
21 you're offered a lot of other things, and some  
22 of those things could be like an advance on the  
23 front end, a guarantee on the back end, a play  
24 share incentive, an equity stake, some  
25 promotional consideration. But there's lots of

1 other ways that you can get value out of the  
2 deal other than the royalty rate.

3           We, you know, have seen deals when,  
4 you know, where not just a royalty rate, but  
5 other things like guarantees an advances are  
6 offered where, you know, we receive compensation  
7 that isn't coming from actual performances or  
8 streams of our masters. It's -- for example, we  
9 could be offered, you know, half a penny per  
10 stream from a service who also says, you know,  
11 at the end of Year 1 we're going to give you  
12 \$100,000.

13           Well, at the end of Year 1 -- excuse  
14 me, I should clarify. A hundred thousand  
15 dollars as a guarantee on what streams. And at  
16 the end of Year 1, our content has only streamed  
17 enough to generate \$50,000 of revenue, as an  
18 example. Well, they're guaranteed to pay us the  
19 minimum of \$100,000, so there's extra \$50,000  
20 we're going to receive as part of this deal and  
21 because that extra \$50,000 is not attributable  
22 to actual streaming of any recording, in a  
23 sense, it's found money. It's unattributable  
24 and we refer to that kind of money as breakage.

25           And when we're considering the total

1 value of a digital streaming deal, we consider  
2 the possibility of that breakage and that's part  
3 of our calculation whether a deal is a good deal  
4 for us.

5 Q. So in your negotiations with digital  
6 services, how does breakage factor into your  
7 negotiations?

8 A. Well, sometimes a digital service,  
9 you know, might approach an independent label  
10 like ours and propose a streaming rate of X, and  
11 we communicate with that streaming service that  
12 such royalty rate is not sufficient, that we're  
13 going to decline their offer.

14 They might come back, the digital  
15 service, and say, okay, we can't adjust the  
16 royalty rate, but if X is a royalty rate is  
17 acceptable to you in the event that we can  
18 guarantee a certain amount of money at the end  
19 of Year 1 or end of Year 2, is that something  
20 you're more interested in?

21 If we were to give you a guarantee of  
22 a hundred thousand dollars or a million dollars,  
23 would you consider moving forward with the  
24 royalty rate we offered?

25 And that would be a sweeter deal for

1 us than just a royalty rate without a guarantee.  
2 And so, as a company, we might decide, okay, we  
3 don't like the royalty rate, but they're  
4 guaranteeing some revenue, we'll proceed with  
5 this license.

6 JUDGE STRICKLER: Excuse me, Mr. Van  
7 Arman.

8 Have you ever been involved in a  
9 negotiation with a streaming service where you  
10 weren't able to come to terms, and therefore,  
11 you did not enter into an agreement with them?

12 THE WITNESS: Yes.

13 JUDGE STRICKLER: Does that happen  
14 regularly?

15 THE WITNESS: It happens  
16 occasionally, yes.

17 JUDGE STRICKLER: If you can, what  
18 percent of the time does that happen?

19 THE WITNESS: For us -- you know, I  
20 am not involved directly in all of our  
21 negotiations, but of the three that I have been  
22 involved with, I would say we have passed on  
23 two.

24 JUDGE STRICKLER: And how many have  
25 there been total for your organization, whether

1 or not you've been involved in? How many  
2 negotiations?

3 THE WITNESS: That's a great  
4 question.

5 And are you talking about all digital  
6 negotiations, whether streaming or download  
7 streams?

8 JUDGE STRICKLER: Let's just do  
9 streaming.

10 THE WITNESS: Just streaming.

11 So we rely, for most of our digital  
12 streaming agreements, on Merlin's negotiation.  
13 So we have opted into a lot of Merlin deals.  
14 There are a few that we've opted out of. But  
15 there are a few that we have -- I would say, you  
16 know from off the top of my head, less than ten  
17 deals that we have done direct negotiations  
18 with. And of those less than ten deals, I think  
19 maybe a minority of them, two or three we've  
20 entered into deals.

21 Often we've been approached by  
22 noninteractive services with direct licenses  
23 where they're offering us a rate that's lower  
24 than statutory rate that's available to us. And  
25 so, for us, you know, when we're thinking about

1 those kinds of proposals, it's not hard for us  
2 to say, hey, it's actually better for us if we  
3 stuck with the statutory royalty rate, which is  
4 paying the higher rate.

5 JUDGE STRICKLER: And how about the  
6 interactive market, the non-statutory market,  
7 have you passed on any licenses and negotiations  
8 with them?

9 THE WITNESS: Yes.  
10 One such license is in my testimony,  
11 which I can't identify publicly, but yes.

12 JUDGE STRICKLER: Thank you.

13 MR. CHOUDHURY: If Your Honor wants  
14 to hear more about that, we just need to go into  
15 a closed session. I'm sure the witness will be  
16 happy to talk about it.

17 JUDGE STRICKLER: We can wait.

18 MR. CHOUDHURY: We were planning to  
19 sort of bring that up at the end and that way,  
20 we can keep the open session.

21 BY MR. CHOUDHURY:

22 Q. You also refer to play share  
23 incentives. Can you tell the judges what you  
24 mean by that?

25 A. Sure. So for many noninteractive



1 services, consumers really don't know how the  
2 music is getting to them. For some services,  
3 what is being played for consumers is, you know,  
4 seeded from an algorithm. Others are curated  
5 playlists. So it is sometimes not clear how  
6 content is getting streamed. And a play share  
7 incentive is when a digital service offers to a  
8 rights holder or label or an artist some sort of  
9 guarantee of air play.

10           They might say, hey, normally, you  
11 are going to get X amount of streams on our  
12 service if you enter into this deal, we will do  
13 a ten percent uplift on that. Or they may say,  
14 we are going to guarantee that 25 percent of our  
15 plays are from your repertoire, but it's  
16 basically as part of a digital agreement  
17 negotiation, some sort of guarantee of the  
18 market share of listening or streams that are  
19 occurring from that service.

20       Q.       You know, do you think that play  
21 share incentives are healthy for the market?

22       A.       I have testified that it isn't good  
23 for the market in the long run.

24       Q.       Why is that?

25       A.       Personally, I feel it's a race to the

1 bottom that, you know, it's something that not  
2 everyone can receive, that there is going to be  
3 a big advantage for a mover and those who move  
4 later and agree to a play share incentive or  
5 they may not even have a play share incentive  
6 that's available to them, will not get, you  
7 know, compensation to what the first movers are  
8 getting, and so the first mover is going to want  
9 to get in there first and it helps this dynamic  
10 of driving down prices for what streaming  
11 royalty rates should be, so I think in the long  
12 run, it is not good for the market. You know,  
13 in the short term, I can see how some companies  
14 can get a short term benefit from it.

15 Q. Do you think play share incentives  
16 affect the consumer's experience of music?

17 A. I think it does, because consumers  
18 are not hearing music based on the merits of the  
19 music or based on -- maybe the benevolent,  
20 denying tastes of DJs, who are championing  
21 artists for noncommercial reasons. What's  
22 happening is commercial terms are dictating what  
23 consumers are experiencing or listening to.

24 JUDGE STRICKLER: Mr. Van Arman, so  
25 you said why you think they used play share is

1 that it would be a race to the bottom and  
2 ultimately be destructive or at least injurious.  
3 With that said, has any of your entities ever  
4 had to deal with the play share incentive?

5 THE WITNESS: Yes.

6 JUDGE STRICKLER: How many?

7 THE WITNESS: Just one that I know  
8 of.

9 JUDGE STRICKLER: Is that something  
10 you can only talk about in restricted session?

11 THE WITNESS: No. I don't think it  
12 is restricted.

13 JUDGE STRICKLER: Take your time so  
14 you don't make a mistake.

15 MR. CHOUDHURY: Your Honor, we can go  
16 into that. We were actually planning to, so we  
17 will go back to that, too.

18 BY MR. CHOUDHURY:

19 Q. Just to clarify, Mr. Van Arman, you  
20 said that you have testified. Did you mean  
21 testified to these judges?

22 A. Well, I provided testimony and also  
23 in a previous rate proceeding for satellite  
24 radio, I also in my testimony talked about this  
25 race to the bottom and this was about three

1 years ago.

2 Q. Have you testified anywhere else?

3 A. I recently, part of the music  
4 licensing reexamination, I was testifying in  
5 front of Congress in June and which is about  
6 ways that we thought from the independent  
7 perspective, copyright laws should be revised.

8 JUDGE STRICKLER: We're probably  
9 getting ahead of what you wanted to -- the  
10 question is something that I'm curious about,  
11 although you didn't believe this race to the  
12 bottom was injurious to the marketplace, you  
13 entered into one of these deals. Was your  
14 purpose of entering into -- at least one of your  
15 purposes of entering into that deal, to obtain  
16 -- be the first mover, so that your company  
17 could take advantage of the first mover  
18 position?

19 THE WITNESS: Yes. And this was a  
20 decision, you know, I can actually not name the  
21 agreement and talk about it. This was a  
22 decision that wasn't easy for us to come to, but  
23 from our perspective, being a smaller company,  
24 usually a company that is offered a take it or  
25 leave it deal at the 11th hour, we are often not

1 had the opportunity to be a first mover, it was  
2 a defensive mechanism. By us being part of an  
3 agreement with a play share incentive as a first  
4 mover, it makes it harder for bigger companies  
5 that normally are first movers to enter into  
6 play share incentive deals with that same  
7 digital service.

8 JUDGE STRICKLER: So it was a good  
9 competitive move on your part?

10 THE WITNESS: It was in our  
11 self-interest, yes.

12 BY MR. CHOUDHURY:

13 Q. On that note, I'm going to ask you to  
14 turn to Page 14 of your written testimony.

15 Do you see that first paragraph, the  
16 one that starts with pro rata terms?

17 A. Yes.

18 Q. Mr. Van Arman, when you wrote this  
19 paragraph, who are you addressing?

20 A. The judges here.

21 Q. Were you writing to anyone else?

22 A. No.

23 Q. Are you aware that Pandora's  
24 economist, Dr. Shapiro, has commented on this  
25 portion of your written direct testimony?

1 JUDGE STRICKLER: Which portion?

2 MR. CHOUDHURY: The pro rata terms on  
3 Page 14, that paragraph.

4 BY MR. CHOUDHURY:

5 Q. Are you aware that Pandora's  
6 economist, Dr. Shapiro, has commented on this  
7 portion of your written direct testimony?

8 A. Yes.

9 Q. Do you know what he said?

10 MR. YOLKUT: Your Honor, objection.  
11 This is clearly rebuttal testimony. Dr. Shapiro  
12 commented on the Merlin deal in the context of  
13 -- clearly in the context of rebuttal. It's  
14 beyond the scope of the rebuttal.

15 MR. CHOUDHURY: Your Honor, if we may  
16 be heard, we understood that witnesses would be  
17 allowed to respond to the rebuttals of -- to the  
18 rebuttal testimony of other -- of other  
19 witnesses who were commenting on their written  
20 direct testimony. This is an instance where Dr.  
21 Shapiro is commenting directly on the written  
22 direct testimony of this witness, in which I am  
23 asking him if he has a response.

24 MR. YOLKUT: We have a different view  
25 of Dr. Shapiro's testimony. It was not in

1 connection with Mr. Van Arman's testimony.

2 MR. CHOUDHURY: And Your Honor, I'll  
3 reference -- what I am asking about is what he  
4 -- what Dr. Shapiro was literally quoting the  
5 testimony and commenting on Mr. Van Arman, and  
6 only that.

7 MR. YOLKUT: If it's clearly grounds,  
8 we can obviously cover on rebuttal with Mr. Van  
9 Arman.

10 CHIEF JUDGE BARNETT: We are going to  
11 confer.

12 (A short recess was taken.)

13 CHIEF JUDGE BARNETT: We have some  
14 difficulty coming up with any qualitative  
15 difference between this circumstance and that  
16 one this morning. This relates to rebuttal  
17 testimony which means it is premature at this  
18 point.

19 MR. CHOUDHURY: Thank you, Your  
20 Honor.

21 BY MR. CHOUDHURY:

22 Q. What role, if any, does statutory  
23 Webcasting royalties play in your business  
24 model?

25 A. They are increasingly more and more

1 the revenue piracy from digital streaming, so  
2 they are important from a revenue perspective  
3 but they also affect our negotiations.

4 Q. How do they affect your negotiations?

5 A. Well, they -- when we are negotiating  
6 with a digital service who can avail themselves  
7 of the statutory license, it serves as a ceiling  
8 so if, you know, if we are trying to work out  
9 royalty rates, it's nearly impossible to get a  
10 royalty rate that's higher than the statutory  
11 rate.

12 Q. Do they effect that your negotiations  
13 with services who are not eligible for the  
14 statutory license?

15 A. Yes. There is a mention in my  
16 testimony, you know, sometimes, increasingly,  
17 services are offering products that have  
18 interactive and noninteractive elements, and so  
19 sometimes we are approached or what I provided  
20 in my testimony for a blanket rate between the  
21 interactive aspects and the noninteractive  
22 aspects and often the statutory royalty rate  
23 that is currently available to noninteractive  
24 services is used as a reference for what the  
25 blended rate should be.



1 MR. CHOUDHURY: I'm going to try to  
2 do this actually without closing the session,  
3 but if Your Honors have any further questions, I  
4 am happy to do a restricted session.

5 CHIEF JUDGE BARNETT: Thank you.

6 BY MR. CHOUDHURY:

7 Q. If you could turn to Page 16 of your  
8 written testimony.

9 Is this the negotiation you were just  
10 discussing?

11 A. Yes.

12 Q. Also, I'm going to ask you to turn to  
13 Page 14 of your written testimony.

14 Judge Strickler asked you earlier  
15 about whether you had ever signed a deal for a  
16 play share incentive.

17 A. Yes.

18 Q. Why would you sign a deal for a play  
19 share incentive?

20 JUDGE STRICKLER: Is the question why  
21 would he or why did he?

22 MR. CHOUDHURY: Why did he.

23 JUDGE STRICKLER: Thank you.

24 THE WITNESS: Well, one thing --  
25 there is some benefits that a statutory license

1 provides us as indies. And one is a level  
2 playing field that all copyrights are getting  
3 the same compensation regardless of who the  
4 rights holder is that is offering that copyright  
5 to the service. In a direct license  
6 environment, being a smaller company, and again,  
7 you know, seeing what happens when we are last  
8 in line to get an agreement done, we have to  
9 sometimes be defensive and we have to, you know,  
10 consider a play share incentive to protect what  
11 is a limited revenue pie. In these new models  
12 for streaming, there is only so much revenue to  
13 be shared with rights holders, based either on  
14 subscription revenue or ad revenue and the more  
15 that some companies can get, because they are a  
16 first mover, leaves not as much for everyone  
17 else. And from the independent perspective, we  
18 are often fighting for scraps on the table and  
19 so in this instance that we entered into this  
20 play share incentive agreement, we did so to  
21 sort of protect our turf. We also, you know,  
22 entered into this play share incentive agreement  
23 not just as labels, but as a distributor. And I  
24 think there is a qualitative difference there as  
25 well.

1                   When we entered into it as a  
2 distributor, we gave the option to all the  
3 labels we distribute whether they wanted to opt  
4 in or opt out of it, and for a distributor to  
5 decide to enter into a deal with a play share  
6 incentive, their motivation is different.

7                   It's really about providing options  
8 to the labels that the distributors distribute.

9                   MR. CHOUDHURY: Your Honors, we're  
10 happy to go further here, but I suspect, I can  
11 see Mr. Yolcut we will hear more about this in  
12 this case and there will be another opportunity  
13 to talk about this unless Your Honor wants to do  
14 it more.

15                  JUDGE STRICKLER: When you say more  
16 to talk about this, you mean in his direct  
17 testimony or someone else's direct testimony?

18                  MR. CHOUDHURY: In his rebuttal  
19 testimony.

20                  JUDGE STRICKLER: That is a judgment  
21 call that you have to make when you proffer his  
22 rebuttal testimony. I have no idea what it is  
23 to do.

24                  MR. RICH: If I may be heard, Your  
25 Honor, if I could demystify this. Everybody in

1 the room except perhaps Your Honors know that  
2 this Merlin and the Merlin Pandora agreement,  
3 that is the subject of this witness's rebuttal  
4 testimony and we actually share our colleague's  
5 view, it's a proper point to do an issue with  
6 respect to his perspectives on it, why they  
7 entered into it and so forth, it's not  
8 presently, but unless Your Honors view it  
9 differently at the time we engage with this  
10 witness on rebuttal.

11 CHIEF JUDGE BARNETT: Thank you, Mr.  
12 Rich.

13 BY MR. CHOUDHURY:

14 Q. Let me ask you: If statutory royalty  
15 revenues that you receive were cut in half, how  
16 would that affect your business model?

17 A. I think it would have a very  
18 significant affect on our budgeting and how we  
19 see the future as an independent label. Right  
20 now, we see -- we see it, you know, at some time  
21 in the future, when streaming is going to exceed  
22 download revenue and we actually can imagine  
23 very soon where all the digital revenues, which  
24 is most of the revenue pie now being streaming,  
25 and we see also increasingly that revenues that

1 we're receiving from the statutory license or  
2 from noninteractive services are a bigger part  
3 of that pie, so if the statutory license was  
4 reduced significantly or housed, I think it  
5 would have a significant impact on our prospects  
6 as a business.

7 JUDGE STRICKLER: If I may follow up  
8 on that? If the -- let me look at the language  
9 of the question, if the statutory royalty  
10 revenues that were received were cut in half was  
11 the question. Is your business profitable now?

12 THE WITNESS: Yes.

13 JUDGE STRICKLER: If statutory  
14 royalties were cut in half, would your business  
15 still be profitable but less profitable?

16 THE WITNESS: Immediately, yes, but  
17 this rate proceeding is for 2016 through 2020,  
18 and I actually have serious concerns whether,  
19 you know, in the middle or the end of that  
20 period of time, we would be as viable as we are  
21 now.

22 JUDGE STRICKLER: If you would be  
23 profitable in 2016 with a rate cut of 50  
24 percent, assuming that was the same rate going  
25 through for the sake of the question, 2017

1 through 2020, why would your concerns about  
2 profitability be different from 2017 to 2020  
3 than they are for 2016?

4 THE WITNESS: It's our belief that  
5 the market is converging in a sense when it  
6 comes to streaming services, that more and more  
7 consumers are not making a distinction between  
8 noninteractive services and interactive  
9 services. You know, a consumer out there in the  
10 marketplace loves their playlist on Spotify.  
11 They love Pandora. Both services pay completely  
12 different rates for what is streamed, and when  
13 the distinction between those kinds of services  
14 become more muddy in the consumer's eyes, we  
15 could see that there is the possibility of a  
16 noninteractive having a significant  
17 substitutional affect, such that we will very  
18 quickly realize that the revenue that we are  
19 counting on coming to us so that we can be  
20 profitable for our artists and for ourselves is  
21 not there anymore.

22 JUDGE STRICKLER: Are you saying, I  
23 think I understand you, that if the  
24 noninteractive rate was the predominant rate  
25 that was paid to you and that predominance

1 occurred over the statutory term, that would  
2 eventually erode and eliminate your profits?

3 THE WITNESS: I think yes, that would  
4 be my guess.

5 JUDGE STRICKLER: Your guess. Is it  
6 a matter of speculation?

7 THE WITNESS: It has to be, because  
8 we don't know exactly, you know, what we are  
9 going to be budgeting in the future of what  
10 other kinds of revenues we're going to get in  
11 the future.

12 JUDGE STRICKLER: That's the problem  
13 with the future, we just don't know it. But is  
14 there a projection?

15 THE WITNESS: Yes, so we project that  
16 in the next five years, that our streaming  
17 income is going to be significantly more than  
18 our downloading income. We actually, some of us  
19 internally think that downloading kind of might  
20 disappear completely within the next ten years.

21 JUDGE STRICKLER: That is a different  
22 cleave than what we were talking about. We were  
23 talking about noninteractive versus interactive.  
24 You are saying that it's your guess, to use your  
25 words, that you would see a substitution.

1 THE WITNESS: Yes.

2 JUDGE STRICKLER: If the statutory  
3 rate was half and you'd see a substitution from  
4 interactive to noninteractive and it's your  
5 guess that that would eventually erode  
6 profits --

7 THE WITNESS: Yes.

8 JUDGE STRICKLER: -- leaving aside  
9 the question about downloads.

10 THE WITNESS: Well, I think, you  
11 know, you have to keep in mind that the  
12 interactive royalty rates that we can negotiate  
13 will also be impacted, so even if, you know,  
14 noninteractive services don't start to  
15 substitute for interactive services in the  
16 consumer market, I provided in my testimony one  
17 example of where an interactive service was  
18 using what was existing statutory royalty rate  
19 to inform what the blended rate should be for  
20 their service, so we see, you know, from our  
21 perspective, the possibility that if the  
22 statutory royalty rate is diminished, that it  
23 could have a diminishing effect on what we can  
24 achieve in the marketplace for interactive  
25 services.



1 JUDGE STRICKLER: The deal that you  
2 are talking about where that read -- or that  
3 proposal was made up, the one on Page 16?

4 THE WITNESS: Correct.

5 JUDGE STRICKLER: And you ultimately  
6 rejected that.

7 THE WITNESS: Yes.

8 BY MR. CHOUDHURY:

9 Q. Just to follow up on that, if you  
10 could turn to Tab 2 of your binder.

11 Mr. Van Arman, if you could look at  
12 Tab 2.

13 Do you know what this document is?

14 A. Yes.

15 Q. What is it?

16 A. This is what was proposed to us that  
17 we were referring to on Page 16.

18 MR. CHOUDHURY: Your Honors, at this  
19 time, I would move into evidence SoundExchange  
20 Trial Exhibit 39.

21 MR. YOLKUT: No objection.

22 MS. VOLKMAR: No objection.

23 MR. FAKLER: No objection.

24 MR. RICH: No objection.

25 CHIEF JUDGE BARNETT: Exhibit 39 is

1 admitted.

2 (SoundExchange Exhibit No. 39 was  
3 admitted into evidence.)

4 MR. CHOUDHURY: Unless the judges  
5 have any further questions, I have no further  
6 questions.

7 MR. YOLKUT: Your Honors, would you  
8 like me to begin cross?

9 CHIEF JUDGE BARNETT: I would like  
10 you to begin cross. At the end of the day  
11 yesterday, I announced we would be in session  
12 from 9 until 4:30 today, even though I continue  
13 to forget that we did announce a quit time of  
14 4:15. Starting tomorrow, 4:15 will be our quit  
15 time.

16 So we're just going to tough it out  
17 today. But obviously, if we are in the middle  
18 of something and we can wrap it up, we will try  
19 to do that on any day except Wednesday, I have  
20 an appointment off campus on Wednesdays, so it  
21 has to be 4:15 on Wednesday.

22 MR. YOLKUT: Your Honors, I have a  
23 number of mercifully skinny binders. May I  
24 approach?

25 CHIEF JUSTICE BARNETT: Yes, please.

1 MR. YOLKUT: Your Honor, may I  
2 proceed?

3 CHIEF JUSTICE BARNETT: You may.

4 CROSS-EXAMINATION BY COUNSEL FOR PANDORA

5 BY MR. YOLKUT:

6 Q. Good afternoon, Mr. Van Arman. My  
7 name is David Yolkut and I represent Pandora  
8 Media in this proceeding. I have a few  
9 questions for you.

10 Mr. Van Arman, you testified that you  
11 were co-founder and co-owner of Secretly Group,  
12 which consists of four independent record  
13 companies, correct?

14 A. Correct.

15 Q. And you also sit on the board of  
16 Merlin as a nonvoting observer; is that right?

17 A. Correct.

18 Q. And Merlin is a global rights agency  
19 that collectively negotiates with various  
20 digital services on behalf of the independent  
21 record industry; is that right?

22 A. Yes. Not the whole independent  
23 record label industry, but a significant portion  
24 of it.

25 JUDGE STRICKLER: What portion of it?

1 THE WITNESS: I think if I had to  
2 guess, I don't know exactly, but I would  
3 approximate -- that is a great question. It's  
4 different country to country, so you are  
5 probably most concerned about the United States.  
6 Maybe a third to half of the indie market share.

7 JUDGE STRICKLER: Thank you.

8 BY MR. YOLKUT:

9 Q. And Mr. Van Arman, actually, on that  
10 point, if you could turn to Page 10 of SX 20  
11 which is your written direct testimony in this  
12 case.

13 In the second sentence, you write:  
14 "Merlin negotiates on behalf of over 20,000  
15 independent label vendors in 39 countries."

16 Does that help refresh your  
17 recollection as to how many independent label  
18 vendors Merlin negotiates on behalf of?

19 A. Yes, that is a gross number but I was  
20 trying to answer like what proportion of  
21 indie --

22 Q. Understood. The reason that these  
23 20,000 independent label members allow Merlin to  
24 negotiate on their behalf is to try to improve  
25 the terms that an independent company could get

1 negotiating on its own, right? I believe you  
2 testified to that on direct.

3 A. Yes.

4 Q. And, in fact, I believe you said that  
5 Merlin can get the independent record label more  
6 favorable terms than that label could get  
7 negotiating in and of itself, correct?

8 A. That is often the case, yes.

9 Q. And I believe you testified that it's  
10 conventional wisdom that when Merlin is able to  
11 collectively represent many independents and  
12 companies such as yours are in a better  
13 negotiating position as an independent company  
14 than if we all tried to negotiate separate  
15 deals, right?

16 A. No, I wouldn't say conventional  
17 wisdom. There have been some Merlin agreements  
18 that we have seen and that we've opted out of.  
19 I also think sometimes independents negotiate  
20 directly with digital services and decide that  
21 what they've negotiated is better than what  
22 Merlin has accomplished.

23 Q. Not to negate the point, Mr. Van  
24 Arman, but if you stay on Page 10, conventional  
25 wisdom, I was actually using your words.

1 A. Okay.

2 Q. Just point you to the first full  
3 paragraph about halfway down, you write: "The  
4 conventional wisdom is that when Merlin is able  
5 to collectively represent many independents,  
6 then we are in a better negotiating position  
7 than independent companies than if we all tried  
8 to negotiate separate deals on our own."

9 That's your testimony, correct, sir?

10 A. Yes.

11 Q. And you signed this testimony as a  
12 sworn declaration, correct?

13 A. Yes.

14 Q. Now you also testified that you sit  
15 on SoundExchange's board; is that right?

16 A. Yes.

17 Q. Would you agree, Mr. Van Arman, that  
18 independent labels are a vibrant and vital part  
19 of the American music landscape?

20 A. That's what I testified.

21 Q. You have got some very prominent acts  
22 under your own independent company, correct?

23 A. Yes.

24 Q. You testified about Bon Iver, a  
25 multiple Grammy winner?

1 A. Yes.

2 Q. And Tig Notaro, who is a Grammy  
3 nominee last year, correct?

4 A. Correct. Yes.

5 Q. Ms. Notaro is currently the subject  
6 of a documentary airing on Showtime this month;  
7 are you aware of that?

8 A. Yes.

9 Q. Are those are just two of the 60  
10 actor artists under your labels, correct?

11 A. Correct.

12 Q. I take it then that you believe that  
13 your signed artists compare favorably to those  
14 signed to other labels such as the majors; is  
15 that fair?

16 A. We do have great beliefs in our  
17 artists, yes.

18 Q. And independent labels have released  
19 some of the most prominent and commercially  
20 successful records of all time, true?

21 A. Yes.

22 Q. Just to name a few, Paul McCartney,  
23 Adele, Taylor Swift, those are all artists under  
24 the independent labels, correct?

25 A. Depends on the territory and depends

1 on what you mean by released. You're right,  
2 those artists are released on independent labels  
3 in some territories, not all territories.

4 Q. When you say territories, do you mean  
5 countries?

6 A. Countries, yes. But in the United  
7 States, those are -- Adele I think is released  
8 on a major, but the other two artists you  
9 mentioned are released on independent --

10 Q. Taylor, Taylor Swift and Paul  
11 McCartney?

12 A. Exactly.

13 Q. And independent labels that artists  
14 -- I believe you testified won over half of the  
15 2014 Grammy awards; is that right?

16 A. Yes.

17 Q. And according to Nielsen's figures  
18 that you cite in your direct testimony, even  
19 independently owned repertoire constituted over  
20 a third of the market for music sales; is that  
21 right?

22 A. According to Nielsen and Billboard,  
23 yes.

24 Q. Let me show you SoundExchange 469,  
25 which is in your binder.



1           This is testimony that you actually  
2   referenced on direct, that you provided to the  
3   committee on -- the judiciary subcommittee on  
4   Court's intellectual property and the Internet  
5   on June 24th, correct?

6       A.       Sorry, which page?

7       Q.       You can start on the title page.

8       A.       Oh. Yes.

9       Q.       You gave that testimony under oath?

10      A.       Yes, I did.

11      Q.       You testified -- turning to Page 2,  
12   that being independent doesn't mean being small,  
13   correct?

14      A.       Correct.

15      Q.       And you also note in the second --  
16   the third full paragraph, last sentence that:  
17   "Independents also currently release over 90  
18   percent of all music released by music labels in  
19   the United States. We are not on the margins of  
20   the music industry, we are together with the  
21   artist creator who we support at the very  
22   vibrant core."

23           Did you give that testimony?

24      A.       Yes. Yes, I did.

25      Q.       And you are proud of the fact that

1 were it not for independent labels, some music  
2 would otherwise never be heard, right? That's  
3 part of your direct testimony?

4 A. Yes.

5 Q. And you would agree that it would to  
6 the detriment of the listening public not to  
7 have wide exposure to good music, right?

8 A. Yes.

9 Q. And just like major labels, you spend  
10 a great deal of time and effort seeking out  
11 recording artists to sign, right?

12 A. Yes.

13 Q. You testified about some of those  
14 efforts to promote the music and career of your  
15 artists on direct with SoundExchange's counsel?

16 A. Can you repeat the question.

17 Q. Sure. You testified about some of  
18 the efforts that your group undertakes to  
19 promote the music and career of your artists?

20 A. Yes, I did so today.

21 Q. And one of the goals of that  
22 promotion is to get air play for your artists,  
23 correct?

24 A. I don't know if I said -- paid air  
25 play, yes.

1 Q. It's fair to say that Internet radio  
2 has increased the exposure to independent  
3 artists, correct?

4 A. Increased the exposure to independent  
5 artists, Internet radio has? Is that your  
6 question?

7 Q. That's the question.

8 A. I hope it has. I don't know if it  
9 has.

10 Q. You haven't undertaken a study?

11 A. No, I haven't.

12 Q. You have no reason to doubt that?

13 A. I have no reason to believe it  
14 either.

15 Q. Are you aware of promotional  
16 activities that Pandora, for example, has  
17 undertaken to the benefit of your artists?

18 A. With -- in connection with the Merlin  
19 Pandora deal?

20 Q. No.

21 A. Refresh my memory.

22 Q. Sure. I am happy to. Do you recall,  
23 for example, that as the lead up to the 2012  
24 Grammy awards, Pandora co-produced an exclusive,  
25 promotional video showcasing Bon Iver which was

1 featured on grammy.com and pandora.com?

2 A. I don't remember that. Was it done  
3 with our approval and involvement?

4 Q. I can refresh your recollection if  
5 the judges will allow. This does not have an  
6 exhibit number. I'm happy to mark it with --

7 CHIEF JUDGE BARNETT: If it is just  
8 to refresh recollection, then we don't have to  
9 mark it.

10 BY MR. YOLKUT:

11 Q. Mr. Van Arman, for the record, the  
12 document I just handed you to refresh your  
13 recollection is entitled -- it's from  
14 grammy.com, from February 2, 2012, entitled:  
15 "The recording academy, Pandora and Pepsi  
16 provide inside look at best new artists  
17 nominated."

18 Do you see that?

19 A. Was this done --

20 CHIEF JUDGE BARNETT: Mr. Yolkut, I  
21 don't think we can have the whole contents of  
22 this introduced into the record. It is just to  
23 refresh his recollection so your next question  
24 should be, does this refresh your recollection.

25 MR. YOLKUT: Thank you, Your Honor.

1 MS. VOLKMAR: Can we get a copy back  
2 here.

3 MR. YOLKUT: Absolutely.

4 THE WITNESS: I don't remember this  
5 being something we agreed to. I am wondering if  
6 this is something the artist agreed to.

7 BY MR. YOLKUT:

8 Q. Bon Iver is one of your artists,  
9 correct?

10 A. What we -- he's not an exclusive with  
11 us.

12 Q. But he is under the Jagjaguwar label?

13 A. Yes. We released a recording for  
14 him.

15 Q. This was in the lead up to the 2012  
16 Grammy awards?

17 A. I don't remember this.

18 Q. Okay. You can put that aside.

19 Are you aware that Pandora also  
20 creates Grammy genre stations featuring Bon Iver  
21 and others?

22 A. I am aware that Pandora does create  
23 genre stations, yes.

24 Q. Rate or air play on Pandora  
25 translates into greater royalties for your

1 record labels and your artists, correct?

2 A. Correct.

3 Q. You testified on direct that your  
4 goal is to make a profit, correct?

5 A. Yes.

6 Q. And in response to Judge Strickler's  
7 question, I believe you testified that you are,  
8 in fact, profitable, correct?

9 A. Yes, on the aggregate, we are  
10 profitable.

11 Q. Now you were asked about royalty  
12 rates being cut in half.

13 Do you recall that question?

14 A. Yes.

15 Q. Now, did you have in mind, when you  
16 heard that question about rates being cut in  
17 half, did you have in mind that it was cutting  
18 in half from the rate that Pandora currently  
19 pays or what you -- what Pandora would be paying  
20 as to the Web II or Web III decisions?

21 A. You are talking about -- when you are  
22 saying what Pandora currently pays, you are  
23 referring to the Pure Play rate and you are  
24 comparing that to the statutory rate that is for  
25 all other Webcasters?

1 Q. Correct.

2 A. I think I was thinking about the full  
3 statutory royalty rate, not the Pure Play rate.

4 Q. Okay. Thank you. I believe you also  
5 testified on direct that the digital revenues of  
6 the Secretly Group have actually more than  
7 tripled over the past five years, correct?

8 A. Correct.

9 Q. You included within that answer  
10 revenues from streaming services such as  
11 Pandora, correct?

12 A. I don't think that is included in  
13 those numbers. I'm not sure. That is based on  
14 -- the analysis was done based on what we  
15 received through our distribution agreements and  
16 Pandora, until recently, was a statutory  
17 license, and so when we received that income, it  
18 is not something that we have coming through our  
19 distribution agreements. So -- but Pandora's  
20 streaming revenues are growing for us.

21 Q. Right. Okay. That's what I was  
22 going to get at in my next question.

23 There's money flowing from Pandora to  
24 your company, right?

25 A. Right.

1 Q. When Merlin is able to reach an  
2 agreement with a particular service, it says its  
3 members have notice of proposed action, right,  
4 describing the deal terms?

5 A. Yes.

6 Q. And giving each member label the  
7 opportunity to opted out of the deal, correct?

8 A. Correct.

9 Q. And Secretly Group receives those  
10 notices as a member of Merlin?

11 A. Not Secretly Group. SC Distribution.

12 Q. SC Distribution, your distribution  
13 source, correct?

14 A. Our affiliated distribution company.

15 Q. And I believe you testified on direct  
16 that independents sometimes face difficulty  
17 getting access.

18 Do you recall that testimony?

19 A. Yes.

20 Q. And I believe you testified that  
21 Merlin helps to mitigate that, correct?

22 A. Some services, you know -- not only  
23 our own experience but the experience of other  
24 labels that we've discussed this with -- won't  
25 enter into deals with labels that don't have the



1 scale of repertoire. They will only enter into  
2 an agreement with Merlin, is my experience.

3 Q. Because Merlin has the scale of  
4 repertoire though, right?

5 A. They're representing a larger basket  
6 of rights.

7 Q. Thank you, sir.

8 A. Yeah.

9 Q. And you consider the terms that are  
10 offered to SC Distribution in deciding whether  
11 to opt out of the deal, correct?

12 A. Correct.

13 Q. And in several cases, your company  
14 has agreed to opt into licensing deals  
15 negotiated by Merlin after reviewing the terms  
16 of the deal, correct?

17 A. SC Distribution typically does  
18 because it's a distributor.

19 Q. And generally speaking, you would opt  
20 into a deal when you come to the view that it  
21 would be to your company's economic benefit to  
22 do so, right?

23 Does that makes sense?

24 A. For a distributor for there's very  
25 little downside into opting into a deal because

1 you're giving the label to distribute the option  
2 to participate in that deal. And part of your  
3 job as a distributor is to give all sorts of  
4 revenue opportunities to the labels you  
5 distribute.

6 Q. But in any event, they would be  
7 receiving the opt-in notice and would consider  
8 whether or not to opt in, correct?

9 A. Right. So SC Distribution does  
10 approach the labels it distributes and asks each  
11 of its labels it distributes whether it wants to  
12 opt in or opt out.

13 JUDGE STRICKLER: Excuse me, Counsel.

14 I think at one point you questioned  
15 the witness and asked about the opt-out. And  
16 the next question you asked about an opt-in.

17 Is it an opt-in or an opt-out? Or  
18 maybe you can just ask the witness the question.

19 MR. YOLKUT: I'm happy to ask the  
20 witness.

21 BY MR. YOLKUT:

22 Q. Sir, when you receive the notice of  
23 proposed action, is the intent of that to ask  
24 the members whether to opt in or opt out?

25 A. If it's okay, can I look at the

1 proposal again to refresh my memory? Because I  
2 can't remember -- for us, we always respond  
3 either way. So I can't remember whether it's  
4 automatically going to opt us in or if we have  
5 to affirmatively opt in. We usually say yes or  
6 no either way.

7 Q. So if you look at Pan Ex 5210, which  
8 is in your binder, does that refresh your  
9 recollection?

10 JUDGE STRICKLER: Before you answer  
11 that question, the first page of this is  
12 strictly confidential on distribution.

13 Do we need to be closing the  
14 courtroom for him to answer this question?

15 MR. YOLKUT: We're not going to be  
16 displaying it on the screen. And I think I will  
17 be able to limit my examination solely to Your  
18 Honor's question about the opt-in versus the  
19 opt-out.

20 And if the witness doesn't know, I'm  
21 happy to stand on that testimony.

22 JUDGE STRICKLER: Well, that may be  
23 fine. I just want to make sure. If even that  
24 is restricted, at least we have an opportunity  
25 to close the courtroom if it's believed to be

1 restricted.

2 Don't answer the question. It's a  
3 question for counsel as to whether they believe  
4 this is restricted information relating to this  
5 agreement.

6 MR. POMERANTZ: Your Honor, we don't  
7 have Merlin here in the room. So maybe, to play  
8 it safe, we should either close the room or just  
9 deal with this on the rebuttal case. We're  
10 going to be dealing with this --

11 MR. YOLKUT: Your Honor, I agree with  
12 Mr. Pomerantz on that.

13 JUDGE STRICKLER: So we're just not  
14 going to get an answer. We'll all just stay in  
15 suspense until rebuttal?

16 MR. POMERANTZ: We don't want to have  
17 any restrictions.

18 JUDGE STRICKLER: How do we get to  
19 sleep?

20 MR. YOLKUT: That's what I've been --

21 MR. RICH: No, Your Honor. Some of  
22 that suspense might be alleviated if you want to  
23 fast forward. Mr. Lexton, who is the general  
24 counsel of Merlin has submitted a rebuttal  
25 testimony. And I suspect in the text of that

1 testimony lies your answer.

2 JUDGE STRICKLER: And that's how I  
3 get to sleep.

4 MR. YOLKUT: Thank you to my senior  
5 partner.

6 BY MR. YOLKUT:

7 Q. Now, Mr. Van Arman, you've previously  
8 expressed the view that market concentration  
9 within the music industry is, quote, a primary  
10 threat to the musical creative enterprise,  
11 correct?

12 A. I'm worried about it, yes.

13 Q. And you've noted on there that 25  
14 years ago there were six major labels in the  
15 recording music market; now there are only  
16 three, correct?

17 A. Yes.

18 Q. And, in fact, you testified to  
19 congress that the three major recording  
20 companies have used their market clout to  
21 extract a disproportionate share of  
22 copyright-related revenue from the marketplace,  
23 correct?

24 A. Correct. And I think that's when I  
25 was testifying on digital breakage practices.

1 Q. And some of those digital breakage  
2 practices you've testified about here today,  
3 correct?

4 A. Correct.

5 Q. And that includes the practice of  
6 advances for guarantees so large that there's no  
7 recourse, correct?

8 A. Yes. When -- when --

9 Q. Thank you.  
10 And you stand by that congressional  
11 testimony, correct?

12 A. Yes, I do.

13 MR. YOLKUT: Okay. Thank you.

14 No further questions, other than to  
15 say that, on the pro rata terms discussion that  
16 was the subject of counsel's question, we will  
17 reserve our cross until rebuttal on that.

18 MS. ELGIN: NAB has no questions,  
19 Your Honor.

20 CROSS-EXAMINATION BY COUNSEL FOR IHEARTMEDIA

21 BY MS. POPE:

22 Q. Good afternoon, Mr. Van Arman.

23 My name is Leslie Pope, and I  
24 represent iHeartRadio.

25 In your testimony on Page 10, you

1 describe certain trends that you've observed in  
2 the direct licensing markets, correct?

3 A. Can I have a chance to look at it?

4 Okay. Can you repeat the question.

5 I'm sorry.

6 Q. You describe certain trends you've  
7 observed in the direct licensing market,  
8 correct?

9 A. Correct.

10 Q. One of the trends you identify is the  
11 use of play share incentive, correct?

12 A. Correct.

13 Q. In a deal with a play share  
14 incentive, a service pays a lower rate in  
15 exchange for playing more music owned by the  
16 record label, correct?

17 A. That is one way it can -- play shares  
18 tend to be very creative. But yes, it can be  
19 asking for a discount on what would be the  
20 otherwise prevailing royalty rates in exchange  
21 for more spins.

22 Q. If I can direct you to Page 14 of  
23 your testimony. In the top paragraph you say  
24 you're afraid that, without a strong statutory  
25 right, the proliferation of deals with play

1 share incentives will become an inevitability;  
2 is that correct?

3 A. Yes.

4 Q. These deals would become an  
5 inevitability because they can be win-win deals  
6 for both of the parties, correct?

7 A. I don't know what you mean by  
8 "win-win.

9 Q. The service wins by reducing its  
10 royalty cost, correct?

11 A. Okay. And how do the other side win,  
12 by getting more spins?

13 Q. You anticipated my question.

14 A. Yes.

15 Q. The label wins by getting more plays,  
16 correct?

17 A. I would -- in that negotiation, that  
18 label acting in its self-interest, in the short  
19 term, it can get a benefit, yes.

20 Q. In fact, you said that entering into  
21 a deal with a play share incentive was a good,  
22 competitive move for your company.

23 A. I would characterize it as a  
24 defensive maneuver. We're concerned about  
25 actually just maintaining our fair share of



1 streams on a streaming service like Pandora.  
2 And so for us, one of the prime motivations was  
3 we actually just prefer there's no play share  
4 incentives.

5           However, in how we're experiencing  
6 the marketplace, where we're often the last  
7 mover, here was a unique opportunity for us to  
8 be a first mover and to look in, you know, what  
9 we think is close to a level playing field for  
10 ourselves.

11       Q.       To be clear, Mr. Van Arman, did you  
12 or did you not testify earlier today that  
13 entering into a deal with a play share incentive  
14 was a good competitive move for your company?

15       A.       I think I said it was in our  
16 self-interest.

17       Q.       I'll let the record speak for itself.

18           Would you also expect to see a  
19 proliferation of deals with play share incentive  
20 if the statutory rate didn't exist at all?

21       A.       Can you repeat the question.

22       Q.       You said in your testimony that we  
23 were just looking at that, without a strong  
24 statutory rate, you would expect proliferation  
25 of deals with play share incentives.

1 I'm asking would you also expect to  
2 see a proliferation of deals with play share  
3 incentives if the statutory rate didn't exist at  
4 all?

5 A. I'm not an economist, but I don't  
6 know if there's necessarily a correlation. You  
7 know, one could argue that, if there was a very  
8 strong statutory license, that that would be  
9 fertile grounds for play share incentives. So I  
10 don't know how I can answer this question.

11 Q. As you said, you're not an economist,  
12 right?

13 A. I'm not an economist or a lawyer.

14 Q. Also on Page 14, you say that labels  
15 enter into deals with play share incentive --  
16 labels that enter into deals with play share  
17 incentives get the play share benefit of signing  
18 on first.

19 The benefit you're describing here is  
20 more plays, right?

21 A. More revenue. And also the defensive  
22 position that I was talking about earlier.

23 Q. Didn't you say earlier that one of  
24 the benefits of entering into a play share  
25 incentive deal is that you can grow your market

1 share?

2       A.       Are you talking about my companies or  
3 companies in general? Because I mean I can  
4 imagine that some companies would be motivated  
5 about, you know, increasing their market share,  
6 and that's why they enter into play share  
7 incentive deals.

8               Our motivation was not to increase  
9 our market share. It was more of a defensive  
10 posture.

11       Q.       You say on Page 14 that you're  
12 concerned that record labels will devalue their  
13 music just to have their songs heard.

14               Why would a label devalue its music  
15 just to have its songs heard?

16       A.       I think some labels believe that  
17 radio promotion leads to sales. And there's a  
18 lot of incorrect beliefs on that.

19               And so we're concerned that -- we're  
20 concerned that, if there's belief of radio play  
21 being correctly -- being directly, you know,  
22 something that leads to sales, and then small  
23 companies are worried about surviving and are  
24 looking to get a deal that can maybe help them  
25 change their tide, that they might be interested

1 in a play share incentive kind of deal.

2 Q. Do you believe that your competitors  
3 hold the mistaken belief that radio promotes?

4 A. We don't necessarily believe that all  
5 the time.

6 Q. When you say you're concerned about a  
7 race to the bottom, your concern is that record  
8 labels will compete with each on price to get  
9 more plays, right?

10 A. Yes.

11 Q. How far would labels be willing to go  
12 to win this race; all the way to zero?

13 A. I can only speak for our companies.  
14 We wouldn't go to zero. I think that if  
15 everyone went to zero, that's not viable either.

16 I can major some companies deciding  
17 to go to zero temporarily. But, you know, I  
18 think, at the end of the day, our feeling is  
19 that plays and streams on noninteractive  
20 services is our product. It's our compensation.

21 You know, we're in a new economy now  
22 where it's not about getting air play to promote  
23 the sales of something else; it is the actual  
24 product that we're trying to promote.

25 Q. You also say you're worried that

1 labels will have to choose between offering  
2 lower rates and being left out of services'  
3 playlists.

4           Would it be detrimental for a label  
5 to have its music left out from the playlist?

6       A.       For the consumer, yes.

7       Q.       Not for the label?

8       A.       Yes. It can be detrimental. But it  
9 could also be in, you know, their business  
10 judgment that, by being left out of a playlist  
11 on one service, that consumers are going to go  
12 to another service for their music.

13       Q.       Labels want services to play more of  
14 their music, not less, right?

15       A.       Can you repeat the question, please.

16       Q.       Labels want services to play more of  
17 their music, not less?

18       A.       When the streams are paid, yes.

19       Q.       Does your label group, Secretly  
20 Group, monitor whether service like iHeartRadio  
21 and Pandora are playing its music?

22       A.       Yes.

23       Q.       So you would notice if iHeartRadio  
24 was playing your music?

25       A.       Yes.

1 MS. POPE: I'd like to distribute  
2 iHeartMedia Exhibit 3569, which is an e-mail  
3 dated November 2013.

4 BY MS. POPE:

5 Q. Who is Hannah Carlen?

6 A. She's one of our employees. She  
7 manages our radio department.

8 Q. Have you seen this document before?

9 A. I saw it at yesterday, yes.

10 Q. Any reason to believe this is not an  
11 e-mail from Hannah Carlen to iHeartRadio?

12 A. No reason to believe it's not an  
13 e-mail from her. I think it is an e-mail from  
14 her.

15 MS. POPE: We offer iHeartMedia  
16 Exhibit 3569.

17 CHIEF JUDGE BARNETT: Hearing no  
18 objection, 3569 is admitted.

19 (IHeart Exhibit No. 3569 was admitted  
20 into evidence.)

21 BY MS. POPE:

22 Q. If you turn to the first e-mail on  
23 the chain, which is an e-mail from Ms. Carlen,  
24 Ms. Carlen writes: "I am noticing some random  
25 but significant holes in what

1 artists/singles/catalog is available from our  
2 artists at iHeartRadio."

3 A. Yes. And I can explain the  
4 circumstances of that if that's useful.

5 Q. You say it doesn't surprise you that  
6 Ms. Carlen noticed these holes?

7 A. Part of her job is to pay attention  
8 to what is being performed in the marketplace.

9 Q. In this same e-mail, she says: "I  
10 think some of it may be a byproduct of search  
11 function glitches. Cayucas yields no results,  
12 for example, even though we did Digital Artist  
13 Integration for two months. But I'm wondering  
14 how best to fill in the blanks."

15 She's asking how to make more of  
16 Secretly Group's music available on iHeartRadio,  
17 right?

18 A. No. She's actually addressing a  
19 technical glitch.

20 When we were with Warner Music Group,  
21 we were digitally distributed by them until the  
22 end of 2013. When --

23 Q. The music doesn't appear on -- she's  
24 asking how she can get your music back on  
25 iHeartRadio, correct?

1           A.       Because Warner Music Group  
2 accidentally took all of our content down even  
3 though we never delivered to Warner Music Group  
4 to iHeartRadio.

5           Q.       And she wants to rectify that error?

6           A.       Correct. Because it's paid streams.  
7 It's not -- it's for all of our repertoire.

8           Q.       She mentions in this e-mail that you  
9 did Digital Artist Integration for two months  
10 with Cayucas.

11                   Do you know if you were paid for  
12 those streams?

13          A.       My understanding of the -- that  
14 program is that we are paid for it in exchange  
15 for advertising, in-kind advertising.

16          Q.       You don't receive royal rates for --  
17 royalties from SoundExchange for songs played as  
18 part of the Digital Artist Integration Program,  
19 correct?

20          A.       For that one artist, of the many  
21 hundreds of artists, we did not for two months.  
22 But we did receive advertising, which we put  
23 value on.

24          Q.       And by "advertising" you mean plays  
25 of that song on iHeartRadio?



1       A.       No. I think they actually promote  
2 via some sort of advertisement only iHeartRadio  
3 what Cayucas is or who Cayucas is. That's my  
4 understanding of the program.

5       Q.       You're referencing online material  
6 promoting the plays of Cayucas on iHeartRadio?

7       A.       It's advertising. Just like a print  
8 ad you'd buy in a magazine.

9       Q.       Okay. If you look at Page 3 of the  
10 document, which is an e-mail dated November 7,  
11 2013, Ms. Carlen writes: "Wonderful. Yeah, you  
12 should see the releases from Secretly Canadian,  
13 Jagjaguwar and Dead Oceans. Priority singles to  
14 repopulate are," and then lists 15 songs.

15               This list includes some of your most  
16 popular singles, right?

17       A.       Correct, yes.

18       Q.       "Skinny Love" made it onto the  
19 Billboard Top 40, right?

20       A.       Yes.

21       Q.       Paula Ceni was nominated for a  
22 Grammy, right?

23       A.       Correct.

24       Q.       And we heard earlier that Bon Iver is  
25 a multiple Grammy award winner, right?

1 A. Yes.

2 Q. I want to look at the November 15th  
3 e-mail at the bottom of Page 1.

4 Here Ms. Carlen writes in the second  
5 paragraph: "Similarly, does the take-down mean  
6 that any songs we had seated on station are now  
7 out of the mix? And if so, is there anything I  
8 can do to rectify?"

9 Ms. Carlen is asking is there  
10 anything she can do to get your music back on  
11 iHeartRadio's custom stations here, correct?

12 A. I think so. I think she's -- yes.  
13 I'm not sure what the distinction between the  
14 custom stations and iHeart's Webcasting. I'm  
15 not in her position. But yes, I think she's  
16 trying to get our repertoire back on  
17 iHeartRadio.

18 And my understanding is that, when  
19 our content is streamed on iHeartRadio, we're  
20 paid. And so when she's pointing out our most  
21 popular recordings, it's good business to say,  
22 "Hey, you know, favor these to go up first  
23 because that's what is going to be streamed  
24 more. And that means more revenue for us."

25 MS. POPE: I think I can leave it

1 there with this document.

2 And let us all leave since I've gone  
3 over time, and you have been very kind in  
4 letting me do so. Thank you.

5 JUDGE STRICKLER: I wanted to ask the  
6 witness a question.

7 On Page 14 of your testimony, your  
8 first paragraph that begins with the bold "Pro  
9 Rata Terms."

10 Do you see that?

11 THE WITNESS: Yes. Yes, Your Honor.

12 JUDGE STRICKLER: The last sentence  
13 there reads: "Without a strong statutory rate  
14 that allows record companies, whether major or  
15 independent, to reject play share incentives, I  
16 am afraid this will become an inevitably."

17 That is the inevitably being the  
18 play -- people adopting -- companies adopting  
19 the play share incentives, right?

20 THE WITNESS: Correct.

21 JUDGE STRICKLER: Why do you think  
22 that you need a strong or higher statutory rate  
23 to be able to reject play share incentives?

24 Because it seems to me economically  
25 it would be the other way around. If you had a

1 high statutory rate, it would be a lot easier to  
2 engage in a play share incentive because you  
3 could cut your rate, get more plays; but all  
4 other things being equal, since you started from  
5 a higher, stronger one, you would be more apt to  
6 do it.

7           Whereas, if you had a lower statutory  
8 rate that was already cutting into your profit,  
9 you would be less willing.

10           THE WITNESS: And I think I actually  
11 confirmed that just right now. I agree. I  
12 don't know if there's necessarily a correlation  
13 between a high statutory rate and whether play  
14 share incentives will go away or not.

15           Maybe when I've been talking about  
16 strong statutory royalty rate, I'm not  
17 necessarily only talking about the actual rate.  
18 I may be talking about -- you know, as I've  
19 testified in congress, you know, I believe that  
20 things like play share incentives and  
21 nontransparent commercial terms dictating what  
22 is played on the air shouldn't be allowed.

23           JUDGE STRICKLER: Well, let's just  
24 change the word "rate" to the word "value."

25           If you had a strong -- well, you used

1 statutory, so maybe that's not right way to  
2 approach you with the question. So let's just  
3 leave your answer as the final word.

4 THE WITNESS: Okay. Thank you, Your  
5 Honor.

6 MR. CHOUDHURY: I have two minutes of  
7 redirect, Your Honor.

8 CHIEF JUDGE BARNETT: Two minutes?

9 MR. CHOUDHURY: Yeah. And that way  
10 we can finish with this witness.

11 CHIEF JUDGE BARNETT: Okay.

12 REDIRECT EXAMINATION BY COUNSEL FOR

13 SOUNDEXCHANGE

14 BY MR. CHOUDHURY:

15 Q. Mr. Van Arman, I'm going to ask you  
16 to look at the e-mails --

17 CHIEF JUDGE BARNETT: Excuse me,  
18 Mr. Choudhury.

19 Does the NAB have questions for this  
20 witness?

21 MS. ELGIN: No, Your Honor.

22 CHIEF JUDGE BARNETT: Mr. Falker?

23 MR. FALKER: No, Your Honor.

24 CHIEF JUDGE BARNETT: Okay. Now you  
25 may.

1 MR. CHOUDHURY: On the clock.

2 BY MR. CHOUDHURY:

3 Q. Mr. Van Arman, can I ask you to take  
4 a look at that e-mail that you were just  
5 questioned about, IHM 3569?

6 A. Yes.

7 Q. Can you explain what was -- you  
8 started to explain.

9 Can you explain what was -- what is  
10 your understanding of what this e-mail chain is  
11 about?

12 A. Yes. So when we were transitioning  
13 our digital distribution from Warner Music Group  
14 to ourselves in the fall of 2013, going into the  
15 beginning of 2014, at that same time Warner  
16 Music Group had entered into a Clear Channel  
17 direct license.

18 We were approached by Warner Music  
19 Group whether -- you know, even though our time  
20 was short with them, whether we should enter  
21 into that license or not.

22 Because we were taking all of our  
23 digital distribution back and being an  
24 independent distributor of our content, we  
25 declined.

1                   However, when all of our digital  
2     distribution repertoire was taken down from  
3     Warner Music Group as it was transitioning to  
4     us, I think what happened was they accidentally  
5     instructed that our repertoire that was on their  
6     system for other services be taken down from  
7     Clear Channel.

8                   And so, as a result, in January or  
9     February of 2014 when -- or maybe even earlier  
10    when this e-mail chain started, that was  
11    addressing the switch that occurred because of  
12    the transition.

13                  MR. CHOUDHURY: That's all, Your  
14    Honor.

15                  CHIEF JUDGE BARNETT: Thank you.

16                  Thank you, Mr. Van Arman. You may be  
17    excused.

18                  MR. POMERANTZ: Your Honor, for  
19    tomorrow, I just wanted to let you know that  
20    we're still in discussions about where -- we're  
21    trying to figure out which witnesses have to go  
22    on tomorrow. We can send you a letter tonight  
23    if you want to just to make sure you know.

24                  We think it's going do be Mr. Hair,  
25    then Dr. McFadden, and then Mr. Lys. But Mr.

1 Huppe was going to go today, and I need to have  
2 discussions with our colleagues here and with  
3 Mr. Huppe to figure out where we're going to put  
4 him. So we'll let you know.

5 That's our current understanding.

6 JUDGE STRICKLER: Were Mr. Hair and  
7 Dr. McFadden, to coin a phrase, must-haves for  
8 tomorrow?

9 MR. POMERANTZ: Yeah. I think  
10 Professor Lys is a must-have as well. So we're  
11 hoping to see if we can get everybody to get all  
12 three of them on and off tomorrow. That's our  
13 goal.

14 MR. RICH: We're doing the steering  
15 to make it happen.

16 CHIEF JUDGE BARNETT: As long as  
17 counsel are aware, I for one don't need any more  
18 warning than that.

19 JUDGE STRICKLER: I like a warning.  
20 It gives me something to read to get to sleep.

21 CHIEF JUDGE BARNETT: 9:00 in the  
22 morning. I'm going to say we're going to quit  
23 at 4:15 because I mean we're going to quit at  
24 4:15. So if we have to bring a witness back, a  
25 must-have who can't come back, then we'll have



1 to bring that witness back.

2 MR. POMERANTZ: Your Honor, which we  
3 could do. It just may not be the next day. If  
4 that's okay with Your Honor, we can work around  
5 that.

6 CHIEF JUDGE BARNETT: You know, if  
7 there's a jury, it's a little bit more confusing  
8 to have people come and go. But we don't have a  
9 jury here. So I think we can handle it.

10 MR. POMERANTZ: Thank you, Your  
11 Honor.

12 CHIEF JUDGE BARNETT: Thank you.  
13 Have a good evening. Happy World  
14 Intellectual Property Day.

15 (Whereupon, the proceeding was  
16 concluded at 4:45 p.m.)

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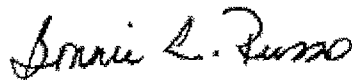
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